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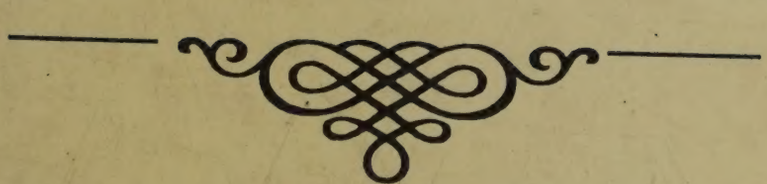
JUSTICE *for* WOMEN

Personal Laws, Women's Rights and Law Reform



Edited by Indira Jaising

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The Other India Press
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Indira Jaising

Introduction

THE DEBATE ON a Uniform Civil Code is as old as the Constitution itself. At the time of the framing of the Indian Constitution, a rule of interpersonal conflict of laws evolved by colonial rulers was allowed to continue without much thought. Instead, a Directive Principle of State Policy was inserted in Article 44 that the State shall endeavour to introduce a Uniform Civil Code. It is not clear how, during the framing of the Indian Constitution, the emphasis shifted to uniformity rather than gender justice. Why, for example, does the Constitution not say, that the State shall endeavour to introduce gender just laws for all communities instead of uniform laws? That would have exposed the contradiction inherent in the Constitution, namely, the guarantee of equality of the sexes, coupled with the guaranteed continued existence of separate and unequal laws for all communities. Women's issues were simply too low on the political agenda to merit detailed attention. And so the women's agenda was swept under the carpet of Directive Principles in the name of uniformity. At the time of the framing of the Constitution, we should have realised that uniformity was not the issue, gender justice was.

It is unfortunate that in the early fifties two eminent judges of the Mumbai High Court, Justice M.C. Chagla and Justice Gajendragadkar, decided in *Narasu Appa* that Personal Laws were immune from judicial review on the ground that they violate fundamental rights. "'Personal law' was not law within the meaning of Article 13 of the Constitution," they held and hence could not be challenged. What this clearly means is that no woman can come to court and say that she is being discriminated against in relation to any field of Family Law. Laws relating to marriage, divorce, maintenance, adoption, custody and guardianship — laws which affect women the most, remain an island untouched by the high moral values of the Constitution. For a brilliant critique of the judgement, the interested reader is referred to A.M. Bhattacharjee's *Hindu Law and the Constitution*.

An issue, which is essentially a women's issue, an issue of gender justice has been politicised and presented as an issue between the majority and minority community. The aftermath of the Shah Bano case was a turning point in the debate over a Uniform Civil Code. The Supreme Court has held in the Shah Bano case that a divorced Muslim woman was entitled to maintenance. In doing so, the court interpreted the Quran and based its decision on the text of the Quran. The hierarchy of the Muslim religious establishment protested against the judgment. The protest was not so much over the rights of Muslim women to get maintenance but over the right of the judiciary to interpret the Quran.

Once again the debate was side-tracked from being about the rights of women, to being about control over power structures. Should power to interpret Personal Laws vest in the secular organs of State such as the judiciary, or in the hands of the religious establishment? That was the issue. The Congress Government led by the late Rajiv Gandhi succumbed to the religious hierarchy and passed the Muslim Women's Protection of Rights on Divorce Act, 1986. The Act had little to do with the rights of women. However, it did satisfy the religious leadership of the community and reassured them that their right to interpret the Quran was intact and their right of control over Personal Laws would be respected. Once again the debate was not over content but over form.

The passing of the Muslim Women's Protection of Rights on Divorce Act, 1986 represents a major turning point in Indian politics. The Act became the rallying point for the Bharatiya Janata Party (BJP) to say that the Congress Government was indulging in the politics of appeasement of the minorities. From then on, the BJP started pushing its view of Hindutva as the solution to the minorities problem. Once again the debate over gender justice just never took off. It continued to be carried on over the foreign and dangerous terrain of Hindutva.

The women's movement has been forced to confront the issue of a Uniform Civil Code on this false terrain. Most groups have taken positions on the question based on their analysis of the politics of the BJP. There have been no independent politics of the women's movement which would provide a perspective on the question of a Uniform Civil Code. It is only now that the movement is beginning to assert that the issue is not uniformity but gender justice. Uniformity is neither necessary nor desirable for its own sake. Several systems have existed with plural laws operating on different groups. Tribals, for instance, have a protected constitutional space and have a system of personal and land laws which cannot be altered without constitutional sanction. It can hardly be suggested that these laws be altered in the name of uniformity.

And yet change is necessary as all Personal Laws discriminate against women. The debate for change must take place on an agenda set by the women's movement. The fight is not just a fight for equality but a fight for justice. It is not just a fight for so-called reform of laws relating to the minority community — Hindu Law for all its bold claim of being reformed treats women as second class citizens. It is not just a fight for rights of the minority community — for within the communities themselves there is discrimination between the sexes. It is a fight, in the ultimate analysis, for justice for women.

Change must be justified on its own merits not in the name of uniformity. The politics of the Congress can be no reason to oppose change and the politics of the BJP can be no reason to enforce change. Yet the need for change to ensure gender justice is compelling. All Personal Laws discriminate against women, Hindu, Muslim, Christian and Parsi. The debate must begin by exposing the claim of Hindu Law that it is reformed. From a critique of Hindu Law, will emerge most clearly, the need to bring our laws into conformity with the Constitution. Then we must move on to a critique of all other Personal Laws. Only such an exercise will lead to a possible conclusion of the need for a family code which applies to all women equally and which is gender just.

This volume contains a collection of essays on Personal Laws that have appeared in *The Lawyers* over the last 10 years. The attempt of the Lawyers Collective has been to publish ongoing critiques of all Personal Laws from the stand point of gender justice. The magazine, which started publication in the year 1986, i.e. in the year in which the Muslim Women's Protection of Rights on Divorce Act, 1986, was passed, has necessarily been influenced by the issues of our times. The article, "The Politics of Personal Laws" explores the origins and implication of Personal Laws. It draws attention to the colonial origins of our laws and the politics of the religious establishment. It points out the discrimination inherent in Hindu Law, Muslim Law, Christian Law and Parsi Law. The need for gender just laws applicable to all alike stems from the guarantee of the Constitution. From this article stems a series of articles focussing on different aspects of Family Law.

One of the most provocative instances of discrimination in Personal Laws involves the issue of Muslim women's rights. Under the Muslim Personal Law, a man can divorce his wife, simply by pronouncing a triple *talaq*. The maintenance the woman gets in return is at best negligible. In "The Triple *Talaq* — Unjust, Untenable, Un-Islamic", Shehnaz Sheikh, herself a victim of the triple *talaq*, discusses the need for the empowerment of Muslim women through changes in Personal Law. In "After Shah Bano",

Danial Latifi focuses on the plight of destitute Muslim women and their maintenance after divorce.

But while instances of injustice within the Muslim community have been highlighted again and again not only by people genuinely interested in women's rights, but also by certain communalist factions who resent a perceived pandering to minorities, they fail to draw attention to the injustice of all other Personal Laws.

Tribal women, too, are subject to sanctioned polygamy, as Chanda Nathani points out in her article, "Denial of Fundamental Rights to Tribal Women". Tribal women are still ruled under the even more archaic system of unreformed Hindu Law. She further observes their lack of succession, partition and agricultural land rights, and challenges the notion that tribal women's rights must be suppressed in order to preserve the tribal way of life.

Under most Personal Laws, divorce is much easier for a man to obtain than for a woman. In 'Section 10 of the Indian Divorce Act: Need for Amendment', Heera Nawaz exposes the difficulties that Christian women face when seeking a divorce. Mere desertion and adultery are not enough to obtain a divorce; a woman must also prove cruelty, bigamy, or incest. For a man, on the other hand, his wife's adultery is enough to let him walk free. In 1995, the Kerala High Court in Sonia Zakaria's case in a historic judgment struck down S. 10 as being discriminatory against women.

Nilima Dutta gives a comprehensive overview of the legal remedies available to a woman seeking divorce in "Women's Rights on Breakdown of Marriage". She discusses women's rights ranging from police protection to child custody. In "Divorce! Do we Need a Change in the Law?", K. Chandru discusses legislation both here and abroad and suggests ways to alter divorce law to make it more humane.

The issue of child custody also presents a major obstacle for women under all personal codes. In "Natural Mother as Custodian of Her Child", Poonam Saxena analyses the conservative tradition of custody laws and points out landmark cases in which this tradition has been successfully debunked. Nilima Dutta provides a practical guide for manoeuvering through the often cryptic maze of women's legal rights in her article entitled "Maintenance, Custody and Guardianship Rights of Women". Another aspect of guardianship involves adoption. In "Maharashtra Ushers in a Uniform Adoption Law", Anju Jain explains how most Personal Laws require the father's consent and presented serious difficulties in the right to intestate succession. She applauds Maharashtra's effort to introduce a uniform law, at least in the area of adoption.

The articles in this volume also focus on property and succession rights of women. In some communities, rights are provided more freely than in others, but in some even relative freedom becomes hazy when looked at closely. In his article "Partition Rights of Female Heirs", P.M. Bakshi discusses the flaws in the Hindu Succession Act, 1957. While this Act attempts to introduce equality between the sexes in the inheritance of property for Hindu families, certain provisions still discriminate against women. Women heirs, for example, do not have the right to the family dwelling house if they are married or deserted or widowed by their husbands. He suggests reform that would allow equal partition rights for all heirs, and adds a newly drafted section to be considered for amendment. Also documented are all State amendments which are efforts in the direction of giving coparcenary rights to women. Susan P. Mathew and Menaka Guruswamy in their article, "Hindu Widows' Property Rights" have traced historical origins of the degradation of the status of Hindu widows and have drawn attention to the changes that have been made in the law relating to widows over a period of 50 years.

Some of the most interesting articles in this volume are the ones that deal with suggestions for law reform. Of particular interest are certain amendments made in the State of Maharashtra to S. 125 of the Cr.P.C. so as to remove the upper limit to which a woman can claim maintenance and the notification which completely exempts women from payment of any court fees. The article "Overdue Amendments" draws attention to these changes.

"The Communal Nature of Personal Laws" is a critique of Hindu Law and argues that the position of Hindu women has become worse rather than better after the so-called reforms of the 1950s. It is a contribution in the debate for a Uniform Marital Property Law, arising from the Personal Laws of all communities.

The goal, with all of these articles, has been to inform, challenge and reform. A Uniform Civil Code, based on the principle of equality and democratic rights, cannot be realised without a critique of existing Personal Laws. Looking back, it is clear that some progress has been made in the last ten years regarding child custody, marriage and succession rights in certain parts of the country. But we are still a long way from a set of laws which would redeem the promise of the Constitution of justice for all.

Part One

The Politics of Personal Laws

1

Indira Jaising

The Politics of Personal Laws

WHEN A PERSON is governed by a particular law, not because he or she is a resident or a national of a particular country, but because he or she belongs to a particular religion, race, caste, sect or tribe, he or she is said to be governed by his or her Personal Law.

Origins of Personal Law

The problems of the continuation of the *legal regime* of the Personal Laws is essentially a political one. With the establishment of the Moghul Empire in India, Muslims came to be governed by Muslim Law and Hindus by Hindu Law. Relations between individuals who were Hindus were governed by the Hindu Law and relations between Muslims by Muslim Law. We thus had a *legal regime* which one writer has described as an "intra-sovereign system of laws".

The British, through their political rule, reinforced and perpetuated this *legal regime* of the personality of laws. As a matter of colonial policy, it was politically expedient for the British not to interfere with existing Personal Laws — in so far as they related to family and inheritance rights alone. Given the predominant object of the East India Company, namely trade, commerce and exploitation of the natural resources of the country, their primary concern was with laws relating to trade and commerce. Uniformity, certainty and universality of business transactions, was the necessity of British Rule. They did not, therefore, hesitate to legislate a Common Civil Code and a criminal code applicable to all communities, regardless of race, religion, tribe or caste. Thus, the Indian Penal Code 1860, Transfer of Property Act, 1882, Indian Evidence Act, 1872, Civil Procedure Code 1908, Indian Contract Act, 1972 all belong to this category of laws and time period. It requires to be stressed that all these laws applied throughout the territory of British India, to all persons regardless of race, religion and community. It is noteworthy that these laws did abrogate in many material

respects the rule of Personal Law or custom. However, as mentioned earlier, Family Law and inheritance were matters left untouched to be governed by a *legal regime* of Personal Law.

The pattern of legislation indicated above would lead to the conclusion that legislation, substantive or procedural, civil or criminal, was dictated by the political needs of the British.

It was imperative to legislate in matters relating to trade and commerce and equally imperative not to legislate in matters relating to family and inheritance in order to make political rule acceptable. The strengthening and entrenching of a regime of religious law facilitated a policy of divide and rule as different communities would owe allegiance and loyalty to different religions, castes and sects.

Christians and Parsis

With the notable exception of Christians, the British did not legislate for other religious communities on matters of Family Law and inheritance. For Christians, the British enacted the Indian Succession Act (ISA) 1865 (replaced by the ISA 1925), presumably as "Secular Law". It is, in effect, a wholesale borrowing of the English Law of Succession. The Indian Christian Marriages Act was enacted in 1872 and the Indian Divorce Act in 1869. Both these are applicable only to Indian Christians. The Indian Succession Act, 1865 defined Indian Christian as a 'Native Christian' namely, a native of India who is or claimed to be of unmixed Asiatic descent and who professed any form of Christian religion. The Act applied to any person who was not a Hindu, Mohammedan, Buddhist, Sikh or Jain. Thus, it became applicable to Christians, Jews and Europeans residing in India. Prior to the passing of the 1865 Act, English Law of Succession was applied by British Courts to Parsis. This led to the demand for restoration of Parsi Law which in turn lead to the passing of the Parsi Succession Act, 1865. The Indian Succession Act, 1925 now contains specific provisions applicable to Parsis.

Hindus and Muslims

Matters of Family Law and succession of Hindus remained largely uncodified and untouched by the British. Thus, prior to independence, Hindus were governed by uncodified Hindu Law. So far as Muslims were concerned, family and inheritance law was left untouched and uncodified. However, there are a few important statutes which require to be noticed. Regulation II of 1772 provided for the application of the "Law of the Quran" to all those cases among Muslims, which would be regulated among Hindus by their Dharmashastras. Thus, in matters of Family Law

and inheritance, British Courts applied "the laws of the Quran" to disputes between Muslims. During the period 1827 to 1887 several British Acts and Regulations empowered the courts to recognise and apply local customs and usages. Often, these customs and usages applied uniformly in a given territory, regardless of race or religion. The statutory recognition of custom led to a demand from the Muslim community for the restoration of Islamic Law as they felt that Muslims should be governed by Muslim Law and not be any custom to the contrary.

Shariat Act, 1937

It is in this context that the Shariat Act of 1937 came to be passed. In the statement of objects and reasons, the following passage appears:

> "For several years past it has been the cherished desire of the Muslims of India that customary law should in no case take the place of the Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-al-Ulama-Hind, the greatest Muslim religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called customary law is simply disgraceful. The Muslim womens' organisations have condemned customary law as it adversely affects their rights and have demanded that the Muslim Personal Law (Shariat) should be made applicable to them.
>
> "The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this, the present Bill if enacted would have a salutary effect on society because it would ensure certainty and definiteness in mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit any doubt or entail any labour in the shape of research which is the chief feature of customary law."

By virtue of this Act, Muslims in India came to be governed in matters relating to marriage, divorce, guardianship, dowry maintenance, gifts, trusts, waqfs and intestate succession (excepting that concerning agricultural land) by Muslim Personal Law. This Act of 1939 is obviously the most significant piece of legislation for Muslims and "restores" Personal Law in preference to custom. Pre-Independence legislation for Muslims in so far

as it relates to family and inheritance is not, by any stretch of the imagination, "reform" legislation but "restoration" of Islamic Laws. Custom, which was often recognised as the governing rule in several fields of family and inheritance law was thrown over in favour of Islam. Thus, whereas in a given locality or territory, people may have been governed by a common local custom regardless of religion, such custom was required to be disregarded and Islamic Law applied.

The Shariat Act, 1939 did not even have the merit of codifying Islamic Law or Muslim Law, as in order to find out what is Muslim Law, one has to go back to text book writers and commentators, who often differ in their understanding of what the law is. The recent controversy over the *Shah Bano* case among Muslims and non-Muslims alike, each trying to prove that their version of the law is the correct version, only proves the point.

The only other significant piece of pre-British legislation is the Dissolution of Muslim Marriages Act, 1939, an Act by which a Muslim woman can petition for divorce on certain stated grounds. The statement of objects and reasons mentions that there is no provision in the Hanafi Code for enabling Muslim women to obtain a divorce and the legislation was, therefore, felt necessary in order to make available to Muslim women the right to divorce available under Maliki, Shafei or Hanabali Law. The Act, therefore, merely extends to Muslim Women following the Hanafi Code, the law applicable to Maliki, Shafei or Hanabali sects of Muslims.

In one very significant respect the Act actually makes the position worse for women. Prior to the enactment of this law, the apostasy (conversion) of a Muslim wife would automatically dissolve a Muslim marriage just as the apostasy of a Muslim male would automatically dissolve his marriage. However, the Dissolution of Muslim Marriages Act, 1939, in terms makes it clear that the apostasy of a Muslim woman will not dissolve the marriage, thus keeping Muslim women in bondage within the fold even after a change of religion, while leaving the Muslim man free to abandon his Muslim wife by changing his religion.

The pattern of British legislative intervention is thus clear: restoration of personal religious laws.

The position, therefore, prior to Independence was that in matters of Family Law and inheritance, Hindus were governed by uncodified Hindu Law, Muslims by the Shariat i.e. Muslim Personal Law, Christians by the statutes mentioned above and Parsis by the personal codes mentioned above. There was no codified law for Jews at all; in matters of succession they were governed by the Indian Succession Act, 1865.

Post Independence Legislation

The Indian National Congress, prior to Independence was committed as a part of its political programme to "reform" Hindu Law and to the enacting of a Hindu Code. Legislation on matters of Hindu Law is a post-independence phenomenon. Between 1954-1956 the major areas of family and inheritance law for Hindus were codified. Thus, we had the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoption and Maintenance Act, 1956.

The British policy of maintaining a separate regime of Personal Laws for different religious communities was continued by the Congress. This again can only be understood in the political context of the partition of the country.

We have so far talked about a dual system of laws -- personal i.e. laws applicable to an individual of a particular religious community such as Hindu Law, Muslim Law, Christian Law and territorial i.e., laws which apply to all persons within a particular political formation regardless of religion, race, tribe or section. In the former case the connecting factor between an individual and the law is religion, race or tribe, in the latter, it is domicile residence or nationality.

It is now time to talk about the Constitutional Law of the country which contains within it, the fundamental guarantees. Article 14 guarantees the right to equality and equal protection of laws throughout the territory of India. Article 15 forbids discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. Article 25 guarantees freedom of religion and conscience, subject to the other provisions of Part III. Article 29 guarantees to minorities the right to conserve their culture.

Entry 5, List III, empowers the Union Government as well as the State to legislate on all matters of Family Law including marriage, divorce, inheritance and all other matters formally governed by Personal Law. Although Parliament is empowered to enact family and inheritance laws for all communities, there has been little or no post-Independence legislation for Muslims and Christians, much less has there been any move towards enacting a common family law for all communities. This failure to legislate despite the mandate of the Directive Principle (Art. 44) which says that the state shall endeavour to enact a Common Civil Code, can only be understood in a political context. The ruling party i.e. the Congress for political reasons, does not wish to alienate the powerful male religious hierarchy of the Muslim and Christian and other minority communities, from which it gets electoral support. It has been politically inexpedient for

the ruling party just as it was for the British to alienate the religious hierarchy of the minority community — the political patronage of the minority communities to the rule of Congress has been too substantial to risk alienating the religious leaders of the communities by enacting reform legislations.

Personal Laws Discriminate Against Women

We have come to the crux of the problem and the heart of the matter — why the need for a "Common Civil Code"? Is it desirable to continue the intra-sovereign system of laws whereby different Personal Laws apply to different communities? Is such a system consistent with a sovereign, democratic, secular and a socialist system?

The need for "reform" has been generally articulated with reference to Muslim Law. However, it must be evident to us, since the whole purpose of this discussion is to look at the provisions of Personal Laws which discriminate against women, that almost all Personal Laws require far reaching reforms if they are to be non-discriminatory.

Hindu, Muslim, Christian and Parsi Law alike contain provisions highly discriminatory against women — it must, therefore, be recognised that the "reform" debate is not confined to minority communities, or in any event, ought not to be confined to minority communities.

The debate on the question, the need for reform, the arguments for and against a "Common Civil Code" have been confused to say the least.

Unfortunately, the demand has been mainly for reform of Muslim Personal Law, leading to the criticism that 'minority rights' will be violated if Muslim Personal Law is reformed. Every time the demand for reform of Muslim Personal Law is made, it is resisted with the cry that 'religious freedom is in danger' or that 'minority rights are being eroded'.

The demand for reform in Hindu Law did not assume urgency in the context of the statutes of 1954-56, which to a large extent made a break with uncodified Hindu Law and enacted substantive rules of family and inheritance law which were far more egalitarian than uncodified Hindu Law. This does not mean that codified Hindu Law is free from sexual bias — it is not. The Hindu Succession Act, 1956 leaves untouched the Hindu coparcenary in which women do not have a proprietary interest. Christian Law is particularly inequitous towards women seeking divorce in as much as the grounds for divorce are very limited — cruelty coupled with adultery, adultery coupled with desertion for two years or more and other more restrictive grounds. The limited grounds for divorce have caused great hardship to Christian women who are deserted or ill-treated by their

husbands, as neither desertion nor cruelty by themselves are grounds for divorce.

Under Parsi Law, daughters get only one half the share of a son in inheritance. (See S. 51, ISA 1926). The Travancore Christian Succession Act, 1916 totally disinherits a daughter who has received *Streedhan* and limits her share to Rs 5,000.

The position of women under Muslim Law is very unequal, to say the least, compared to men — a) a Muslim male can marry four wives; b) a woman can be divorced by unilateral pronouncement of the triple talaq; c) a Muslim daughter inherits only half the share of the son; and d) a divorced Muslim wife is not entitled to maintenance.

The father is the natural guardian of a minor child in all different systems of Personal Law and also under the secular Guardians and Wards Act, 1890. This so-called natural right of the father of guardianship to the exclusion of the mother has had devastating consequences for women, particularly in cases where the marriage has broken down. It makes women constantly insecure about their right to take any meaningful decision relating to their own marriage and their children.

We have not referred to the position of tribal women so far. There is no codified family or inheritance law dealing with tribals at all. This leaves them governed by customary law which varies from region to region and tribe to tribe. The Hindu Succession Act specifically excludes tribals from its operation. The British policy in this regard again seems to have been non-interventionist. Post-Independence policy has also been non-interventionist, but at least theoretically has had a different justification. The desired preserve the cultural identity of the tribe and the need to prevent non-tribals from grabbing tribal lands has led to the passing of laws which prohibit the alienation of tribal lands. The Constitution of India provides for protective discrimination in favour of tribals: reservations in jobs and reserved constituencies for Lok Sabha and Assembly elections etc. The same protectionist policy has left the tribals untouched by state made law.

The demand for reform, in this context, must be a demand for *sexual equality*. It would be better to reformulate the demand so as to focus on the sex discrimination which is written into all Personal Law. This will have the merit of not only emphasising the secular nature of the demand but also its rationale, namely, the urgent need to make equality for women a reality under a Constitution that guarantees equality between sexes.

Further Reading:

1) David Pearl: *Interpersonal Conflict of Laws*, N.M. Tripathi & Co., Bombay, 1981.
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3) A.M. Bhattacharjee: *Muslim Law and the Constitution*, Eastern Law House, Calcutta, 1985.
4) A.M. Bhattacharjee: *Hindu Law and the Constitution*, Eastern Law House, Calcutta 1983.
5) Tahir Mehmood: *An Indian Civil Code and Islamic Law*. N.M. Tripathi, Bombay 1976.
6) *Mohammad Ali Khan v/s. Shah Bano* AIR 1985 SC 1945.

(From, *The Lawyers*, February 1986).

2

Gail Omvedt

Towards A Non-Sexist "Civil Code"

AFTER THE REVERBERATIONS of the "Common Civil Code" fiasco of the last few years it is time for the women's movement to think seriously and collectively about the issue. As long as it remained at the level of sloganeering it turned out to be harmful. It is not only that the term "Common Civil Code" was used in a reactionary way — by Hindu fundamentalists who took it as a stick to beat the Muslims with or by Muslim fundamentalists who turned around to treat any talk of the rights of women as an attack on their religion.

The term itself is also quite vacuous and open to misuse. Its primary meaning that there should be one common law as between the different religious communities in India, by itself does not define this law as necessarily non-sexist and equalitarian. It is quite possible for a "common" code to be patriarchal — this after all has been true in European countries for centuries (remember the saying: "In English Common Law the husband and wife are one, and that one is the husband"!). The women's movement in India has indulged in a certain amount of wishful thinking that "Common Civil Code" means a non-sexist code — but for the masses of people it seems clearly to have a different meaning, referring to a certain way of conceiving "national integration". To put it more bluntly, Muslim men should not be allowed to oppress their women in any way different from Hindu men!

Concretising the Code

What women want is not a "common" code but an equalitarian one. This in fact was the resolution adopted after intensive debate at the December 1985 women's conference in Bombay. The resolution calling for an equalitarian civil code made it clear that all religions oppressed

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women. Yet so small was our voice and so loud the voice of reaction that the conference resolution was simply headlined as giving support to a "Common Civil Code".

What is urgently needed is to get out of the abstract and emotive field of slogans and talk concretely about exactly what legal provisions should exist in regard to marriage, divorce, maintenance and child support, child custody (and generally the rights of children), property and other factors. It is necessary to think not only legally but also politically — what will be the process of moving towards instituting and implementing any kind of ideal code we might formulate? We need to organise discussions, workshops and seminars at all levels with lawyers and women activists, as well as on a broader basis with ordinary women and men who are perhaps more capable of understanding the basic issues than many think and who will, after all, provide the force behind any move to change and implement laws.

This process should be possible now because there seems to be increasing concern about such issues among the masses of women as well — particularly with the number of divorced or deserted women among all communities growing daily, women who seem increasingly ready to fight for their rights.

Those who have seen adivasi women in Dhule district voicing their demand for legal reform, or the peasant women coming up to the platform of the Shetkari Sanghatana at Chandwad to say "we want our hissa!" will realise that such women, given some scope, are ready to stand up on such issues. But it is necessary to give a framework for such a fight, to provide organisational support, and to provide legal expertise and rationale. This task is all the more urgent now because the government itself is moving to formulate a "Common Civil Code" — and though this will only be optional; it will undoubtedly provide the frame work for future laws and action.

Towards An Equalitarian Code

In the interest of furthering such a discussion, here are a few comments about some major points:

Perhaps we should start by saying something about the process. At present there is an incredible variety of different and very messy Personal Laws in India, and a tremendous amount of emotional and political force (not to mention economic self-interest) organised around them. We know we are not going to wake up one morning either after an imagined revolution or as a result of some sudden decision by the existing state and suddenly find our ideal "equalitarian civil code" declared applicable to all. Then how are we going to move in the direction of a rational law?

Here, the formulation of the issue in the Shetkari Sanghatana's Chandwad session is very interesting. Their resolution reads as follows:

> "(4) Every citizen of the Republic should be *a priori* considered as being governed by the Common Civil Code; however, any citizen or his guardian should have the possibility of opting for the civil system of any of the established religious codes;
>
> "(5) The official judicial system should not intervene in civil disputes between citizens opting for a given religious code;
>
> "(6) The disputes between citizens opting for a single religious code shall be decided according to the Common Civil Code, should any of the parties take recourse to the official judicial system."

This is a way of formulating the issue that points to a useful transitional stage or process between the existing plurality and equalitarian, common law. But I would make two amendments:

(1) Replace the emotive and vacuous term "Common Civil Code" by the term "Indian Code" or better yet, "Bharatiya Code";

(2) Let the choice of codes be as follows. At the time of marriage every couple shall declare before a government registrar whether they wish themselves and their heirs to be governed by the Hindu code, Muslim code, Christian code etc. or the Bharatiya Code.

Marriage

Now we have to come to the important substantive questions — what provisions and laws should be in such a code? All the complex issues of marriage, divorce, maintenance, property have to be well formulated before we can organise some support behind them. At this point perhaps only a few comments can be made about marriage and the general concept of the "family".

Practically all religious codes embody very concrete forms of male chauvinism in their marriage ceremonies. The Hindu code is far from an exception: after all the reform, *saptapadi* is still taken as the legal criteria for the ceremony to be valid. (Actually by this, the majority of marriages among non-Brahmans, at least in Maharashtra, are invalid). However, there are not only a variety of actually existing customary forms, there are also several progressive traditions of marriage ceremonies which have had some mass popularity — the Satyashodhak marriages of Maharashtra, the Self-Respect marriages in Tamilnadu, "Gandhi Weddings" in the days of the national movement, "Jayamala" marriages in some parts of North India. These, apparently, sometimes have a formal legal status and sometimes are only informally certified if and when a marriage is registered. The best way

to get around all the confusion would be to simply set up a registration procedure for all marriages, with the legal provision that any couple swearing before such a registrar that they have been married by their chosen methods shall be legally registered as married. (It is at this time that the couple would choose the "civil code" which they desire to be applied to them). Such a registrar could also confirm legally all existing marriages in the village. Undoubtedly, it would require some expense and training to set up the government machinery to have such a registrar in every village but it would be more than compensated for by the savings on unnecessary court costs, not to mention the protection to countless women who even today have no proof that they were ever legally married.

Definition of "Family"

Before even beginning further discussions it might be noted that almost any use of the concept of "family" in existing laws is likely to be patriarchal. As an example, take this definition of the family written into a contract between the World Bank and the Government of Gujarat regarding provisions of land for families evicted for the Sardar Sarovar dam (part of the Narmada project):

> "(1) A family shall include husband, wife and minor children and other persons dependent on the head of the family, e.g. widowed mother.
>
> "(2) Every major son will be treated as a separate family."

This came to light during a discussion in Dhule of the Narmada Dharangrast Sahhayak Samiti, and only after some intervention by women activists present was the second clause changed to read: "Every major son or unmarried, widowed or divorced daughter will be treated as a separate family." (It also seems that this aspect was dropped from the committee's proposals by the time a further petition was made to the Maharashtra Government regarding the Maharashtra evictees of Sardar Sarovar). It should be clear that this change in the second clause does not really solve the problem: a "patriarchal" definition is embodied explicitly in the second clause and implicitly in the first clause — for every time the concept of "head of family" is used in the Indian context it is bound to be taken to refer to the main adult male.

It also seems clear from this example that all of the movements that have been going on in India to get land or other property for evictees from dams and other development projects — as well as all the initiatives from the Government to give land to the landless, houses or house-sites to the homeless, etc. — overwhelmingly have gone on reaffirming and re-legalising the existing patrilineal, patriarchal family structure, in which the

male is head of household and holder of the basic property. Unless land or other property is given explicitly in the name of both husband and wife, the patriarchal family structure will simply go on functioning. In fact, provision for "joint pattas" in the case of land distribution was written in a policy provision in the Sixth Plan, but few government officials know about it and it is rarely implemented. But why blame the government when peoples' movements themselves seem unconscious of the issue?

Demands

Before we even get into the complicated tangle of inheritance, maintenance and property laws, then, there are some very simple legal demands that might be made:

(1) Eradicate any legal reference to "head of family".

(2) Any land, houses or other property given to the landless, homeless, etc. should be given as joint pattas, in the names of husband, wife and any other adult members of the family.

(3) Any ongoing process of registration of existing land rights or revision of the "record of rights" shall also be in the form of joint pattas, including female members of families.

(4) In all current processes of awarding land, houses etc. to the landless and homeless, preference shall be given to the most needy group among them — families in which no adult male is present, i.e. "female-headed families".

(From, *The Lawyers*, February 1987).

3

Heera Nawaz

Towards Uniformity

ALTHOUGH ALL RELIGIONS were initially founded with the aim of purifying men and women and helping them to lead ethical lives through prayer, it was found in some instances that blind traditions, customs and superstition often resulted in — not the cathartic effect of religion — but the spread of communalism, fanaticism, fundamentalism and discrimination. It was no less a person than the President Dr Shankar Dayal Sharma who said in his Republic Day address, on 26 January 1993, that the difference between religion and communalism is "as far as sacred is from profane and good is from evil".

Opposing Religious Discrimination

Communalism is a very dangerous thing as it portends discrimination. This discrimination is made at two levels — one, between people of different religions, and two, between the two sexes. In a free nation, democratic state and egalitarian society, such discrimination should be done away with, possibly by introducing a Uniform Civil Code. Understandably, the very words may incite anger, and enrage some communities. The belief in its enforcement and its worth is not arbitrary, it is not intended to hurt the religious and therefore sensitive sentiments of a minority community but is expressed on introspection as it is a *modus operandi* to remove men and women of India from the mire of inequality in matters relating to religion which encompass most facets of everyday life.

Article 15 of the Constitution very lucidly states that the state "should not discriminate on the basis of religion, race, caste, sex, place of birth..." If a uniform code is enforced, the advantage is that none of the above criteria become factors for discrimination. If it is enforced, it would be realistic to introduce the code in the fundamental rights section (Part III of

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the Constitution) — and not as per Article 44 in the directive principles of state policy where it is now. As only then, will it be justifiable in a court of law where, if it is violated, a writ can be filed under Article 32 (Right to Constitutional Remedies).

Ensuring Equality to Women

For women who constitute almost half the population of India, the introduction of a uniform code can provide them with equality and justice in courts of law. Further, its importance to women lies in the fact that even though they belong to different religions, they will have a uniform application of laws in matters pertaining to marriage, divorce, maintenance, custody of children, inheritance rights, adoption, etc.

Women of all religions face similar problems and vicissitudes, so why should they be accorded different treatment and different reliefs in courts of law according to the different Personal Laws based on the different religions they follow?

Following different Personal Laws for different religions not only discriminates between women of different religions but also between men and women of a particular religion. According to the Indian Divorce Act (applicable to Christians), Christian men have to establish one ground, i.e. adultery, to secure a divorce, but Christian women have to establish two grounds to get a similar relief. Muslim men can easily divorce their wives by proclaiming talaq three times but conversely, a Muslim woman cannot divorce her husband so easily. As for Hindus, men have unequivocal rights to coparcenary property at birth, but Hindu women do not. (However, recently the Karnataka Hindu Succession Bill was passed amending the law to provide coparcenary property from birth to Hindu women residing in Karnataka. It is reliably learnt that similar Bills have been passed in Kerala and Andhra Pradesh, but in other states, Hindu women do not have this right).

It is obvious that discrimination against women at these two levels can be removed by a uniform code.

The report of the committee on the status of women in India which was published in 1975, by the Central Government, takes a very clear stand on this matter: "The absence of a Uniform Civil Code in the last quarter of the 20th Century, 27 years after Independence, is an incongruity that cannot be justified with all the emphasis that is placed on secularism, science and modernisation. The continuance of various Personal Laws which discriminate between men and women violates the fundamental rights and the preamble of the Constitution which promises to secure to all citizens 'equality of status', and it is also against the spirit of national integration

and secularism. Our recommendation regarding amendments of existing laws are only indicators of the direction in which uniformity has to be achieved. We therefore recommend expeditious implementation of this Constitutional directive by the adoption of a Uniform Civil Code."

At this point, one may ask the question, why is the introduction of this uniform code important to women? As seen in the following examples, communalism has taken the upper hand, causing inequality, hardship and suffering for women. In Iran, for example, women played a great role in opposing the Shah and in 1979, gathered to celebrate his fall. Their joy however was short-lived as the new leader abolished all previous legislation favouring women's rights. In 1973, 30,000 Italian women marched to Rome for abortion rights which were being denied by the Church. The Nepal Women's Organisation had been agitating for equal rights in matters relating to marriage, divorce and matrimonial property.

Abolishing Unfair Religious Practices

Several fundamentalists say that matters pertaining to the family are personal and therefore within the parameters of religion. Sometimes religious practices can curtail the freedom and equality of women since these practices are man-made and unless they are challenged as being unfair to women, the fate of these women will be left not to the Gods, but to the fundamentalist authorities. A few examples of their unfair practices are: ill treatment of widows, polygamy practised by men, child marriages, untouchability and other caste disabilities, human sacrifices (practised by some tribals), purdah, etc.

In India, there are two cases in relatively recent times which throw light on the aggressive turn religious fundamentalism can take. The first case was the cruelty shown to Hindu widows by religious obscurantist customs. In September 1987, Roop Kanwar committed sati, an obsolete, inhuman and defeatist practice. The second was that Muslim women became non-persons upon divorce under the Muslim Women's (Protection of Rights on Divorce) Act. Seventy year old Shah Bano filed for maintenance at the end of a six year long legal battle. Several processions were led by Muslim fundamentalists who believed that the Supreme Court's decision was against the tenets of Islam. The Congress (I) Parliament reversed the judgement of the Supreme Court. The new Act exonerated Muslim men from maintaining their wives after divorce and instead placed the burden of maintenance on the woman's blood relations. The above two episodes indicate that women are in many cases trapped as they are often wedded (literally, as well!) to their oppressors and because their subordination is clothed in religious rhetoric or fundamentalism.

Violation of Article 25?

Interestingly, Article 25 of the Constitution which has given the right to citizens "to profess, practice and propagate religion" could well turn out to be a guaranteed right to state supported communalism unless there is a check on Article 27 (which prevents the state from entanglement with any religion). This state supported communalism could violate other fundamental rights guaranteed to women. Let's elucidate: Suppose a law abolishing a religious practice that is unfair to women is enacted and because of this men of that religion say that this violates the "essential core" of their religion, can it be argued that such a law (though it would help women) is unconstitutional (as it is against the "essential core" of that religion) and that it therefore violates Article 25? What then is to be made of the Right to Equality for women enshrined in Articles 14 and 15? Under the "equality clause", men and women are equal in the eyes of law.

Clearly, an anomaly exists and if the Family Law continues to be linked up with religion as it is now, then this ensues a hands-off policy of the state towards women's issues and consigns them to the mercy of religious pundits who decide cases based on laws pertaining to religion. This is precisely how a Uniform Civil Code could arrest the inadequacies, inequalities and injustices meted out to women.

No Threat to Minorities

However, to be perfectly fair, the introduction of a uniform code may be looked upon with disdain by several communities. Understandably, there are a number of individuals who feel that the enforcement of a uniform code would impinge on their individual dignity and religious identity and cause their ethos, culture and family values to be undermined. The minority communities have a right to ensure that their cultural freedom should not be encroached especially since an enforcement of a uniform code could force the majority community's civil laws upon them. This may not be unreasonable as there are several fanatical organisations who want a uniform code for the simple reason that their code would be the Hindu Code for everyone!

While minorities have a right to feel threatened by the introduction of a uniform code, it is patently unfair that opposition is coming from certain propertied classes who feel that if this uniform code is introduced, they will have to share their property with their sisters and wives which they do not want to do. Such an attitude is unforgivable and smacks of unfairness.

Religion should not survive at the cost of women's freedom and equality. For bear in mind Manu's quotation, "Where women are honoured,

the Gods rejoice." On 8 March, International Working Women's Day, we should see to it that women are honoured in all realms, particularly the realm of equality with men, and there should not be discrimination on the basis of religion — an issue neglected and kept under wraps for too long.

(From, *The Lawyers*, March 1993).

4

Naeem Vargo and Robin Goldfaden

The Goa Uniform Civil Code — Alive and Kicking

THE CONTROVERSY OVER DESIGNING and implementing a Uniform Civil Code blusters, blunders and rages on throughout India. But along the serene, surf-washed beaches of Goa, a Uniform Civil Code is alive, well, and flourishing, as it has been for almost 500 years. In the sensationalism and sentiment surrounding the controversial religious and Personal Laws in the country, a working model of a Uniform Civil Code — one that exists under our very noses — has largely been ignored. Surely the Goan Family Laws are not a national secret. That they have been kept under wraps, either explicitly or implicitly, only undermines the seriousness and credibility of the entire Uniform Civil Code debate.

The Goan Family Laws are not widely publicised nor understood, both within and outside Goa. Lawyers in Goa admit that their Family Laws are not perfect and that, as with any legislation, there is always room for improvement. To start with, the laws are a legacy of the Portuguese occupation of Goa, Daman, and Diu, and are written in Portuguese. They have been kept alive for about 500 years through unofficial translations and through interpretation by the courts. But even so, documentation of case law is meagre and not widely accessible.

A Senior Advocate of the Goa High Court, Mr M.S. Usgaoncar has translated the Goan Family and Succession Laws into English, a first and major step towards publicising and re-evaluating the laws. As a second step forward, the government has also appointed a Goa Law Commission to study the existing laws and make recommendations to either retain, extend, or alter them.

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This article outlines some salient features of the Goan Family Laws as they apply to the issues of property distribution surrounding marriage and divorce. According to the Uniform Civil Code in Goa, marriage is a contract. Parties who want to get married must register their intent to marry, and later, they must register the marriage itself. When there is a conflict between religious laws and the Uniform Civil Code, the Code supersedes the religious laws. Thus, if two Goans marry under their religious rites and do not register their marriage, it will not be legally recognised in Goa.

About Marriage

Family Laws not only require that the parties register their marriage, but also that they stipulate the system under which their property will be governed. Goan law allows parties who are marrying to design the allocation, administration, and distribution of their property under one of three systems. The system that will govern the properties of the two parties is to be decided in an ante-nuptial agreement before the marriage is solemnised; once the marriage is solemnised, there can be no revocation of the ante-nuptial contract by way of a new contract.

In the absence of an ante-nuptial contract regarding the distribution of property, the custom of the country governs by default. This custom presumes that the spouses are married under the simple communion of acquired properties. Under this system, the spouses register their separate properties at the time of marriage. These separate properties include the property that each spouse holds at the time of marriage, or that which is acquired by succession, gift, or under a previous exclusive right. If separate property is not registered at the time of marriage, it is considered to be community property. Debts incurred prior to marriage are charged to the property of the debtor spouse. All property acquired during the marriage is considered to be jointly owned by both spouses and is to be equally divided if the parties divorce.

The spouses can choose to marry under separation of properties, but they must expressly reject the regime of communion of acquired properties. Under the separation of properties system, each spouse will have ownership strictly according to title. Spouses who choose to marry and divide their property under the third system, dotal regime, must specify the property included in the endowment.

The parties have considerable freedom in designing distribution of their property, as long as they do it in the ante-nuptial contract. For example, they can identify the property that will remain separate, and agree to be governed by the separate property regime. In the same ante-nuptial contract, they can stipulate that they will switch over to the community

property regime if and when they have children.

The Goan Family Laws protect both parties in so far as they require them to clarify property issues before marriage. However, they do not guarantee that the division of properties will be equitable if there is a breakdown of the marriage. Shubhalakshmi Naik, a leading advocate at the Goa High Court, explains how the laws can be subverted at every stage of the marital process. She maintains that a lack of awareness of the laws is one of the major barriers to their effective implementation. For example, women know that a registration is required at the time of marriage. Often, the husband's family will register the intent to marry but will not follow up with the actual registration of the marriage itself. The "wife" assumes that she is protected by the communion of property laws, only to find that her married status is not legally recognised in Goa and she never ever had any of the rights conferred by the Laws on a wife.

Another major barrier to the effective implementation of the Laws is the social pressure that is brought to bear on women who own property and wish to marry with the benefits of the separate property regime. The husband's family and other members of the community can break down her resolve with the threat of day-to-day disapproval. Given the background and social conditioning of women in India, it is more than likely that many women will succumb to this subtle pressure and surrender their rights.

The concept of dowry is also different in Goa, in that dowry is generally not a demand from the groom's family; rather it is an "advance" on the inheritance that a daughter can claim from her parents. Often, however, it is given as her share, valued at the time of the marriage. This is done with the understanding that the daughter will not claim anything further from her parents after their deaths, even if there is a large disparity in value between the time of her marriage and the time she can claim her inheritance.

In addition, it is often the woman's own family that will insidiously undermine her interests. Ms Naik reports that some families will go so far as to refuse to allow the young women in the household to get married so that they can keep the property within the family. Even in cases where a woman who is marrying gets her fair share of the family property in terms of value, it is given to her as the equivalent movable property. The sons are given the immovable property — the land, the house — and the daughter is given items like jewelry. It would be easier for her in-laws, if they are so inclined, to manipulate the movable property against her will and to her detriment.

Moreover, the caveat requiring that immovable property, whether common or exclusive, cannot be alienated (with limited exceptions) or charged in any manner without the consent of both spouses is a double-

edged sword. On the one hand, it provides an effective barrier to unilateral disposal of the immovable property by one of the spouses. On the other hand, a vindictive spouse can prevent the other from dispensing with her or his own property or using it to its maximum economical advantage if such advantage lies in the sale of the property.

Senior Advocate at the Goa High Court, Mr F.J. Colaco further clarifies that although "dowry" is not illegal, its connotation in Goa is different from the negative connotation it has acquired outside of this small state. In Goa, the dowry is generally not a demand made from the groom's family, but rather an advance on the inheritance that the bride can rightfully claim from her parents.

About Divorce

In case a party moves for a legal separation, the court gives permission to convene a family council, which consists of three members from each spouse's family and the Public Prosecutor. The family council decides whether the separation should be granted and also decides the amount of maintenance to be awarded. Either of the spouses is entitled to claim maintenance from the other. The award is based on the need of the spouse who requests maintenance and the financial circumstances of the spouse who will pay it. These same criteria are used to adjust the amount of the maintenance at a later date, if the position of one of the parties changes.

Maintenance is given under general Indian Law (S. 125). Ms Naik says from her experience that alimony is a separate issue and is usually fixed at one-half of the salary of a spouse, if the other spouse is not earning anything. Maintenance is part of a divorce suit only if it is filed along with the divorce action; in such a case, the parties' respective shares of the marital property and their income from it are considered when the maintenance amount is being decided. However if the suit for maintenance is filed separately from the divorce action, then the parties' ability to maintain themselves on the income from their holdings is not factored into the maintenance award.

Divorce can be obtained by mutual consent or it can be contested on certain specified grounds. The concept of fault is introduced with its attendant consequences when there is a contested divorce. For example, the presumption is in favour of granting custody of the children to the "innocent" spouse. At the time of divorce, the regime of property distribution that was decided upon in the ante-nuptial agreement governs the allocation of the marital assets.

Senior Advocate of the Goa High Court, now retired, Mr Mulgaonkar agrees with Ms Naik that the basic framework of the Goan Family Laws is sound and equitable. The property distribution regime that is crucial is the

one that is chosen by default — the communion of acquired properties — because it is the one that is applied in the vast majority of cases. Both Mr Mulgaonkar and Ms Naik are of the opinion that this regime provides the baseline for fairness and security in marriage. Mr Mulgaonkar in fact says that the Family Laws (in conjunction with the succession laws) in Goa have an indirect but important potential for promoting family values and keeping the nuclear family structure strong. Ms Naik adds that with increasing social awareness, especially among women, the Goan Family Laws need no major revisions.

Mr Colaco, who studied law in Portugal, and is fluent in Portuguese, also favours the default regime of communion of acquired properties, for the same reasons as Mr Mulgaonkar and Ms Naik. All agree that the current laws are basically just and that they are interpreted and applied evenhandedly by the judiciary in Goa. From their experience, they report that a majority of the population also favours the current state of the Family Laws in Goa over the system in the rest of the country.

Another Senior Advocate of the Goa High Court, Mr Z. Pereira, disagrees and favours the default regime of separate property. Mr Pereira uses the example of a couple who marry under the current laws, without delineating what property was acquired by them before marriage and should be kept separate. A majority of the marriages follow this pattern. Trouble rears its head when the marriage lasts not for a quarter century but rather for a quarter of a year. Mr Pereira feels that in such a case, it is unfair to the spouse who came into the marriage with a lot of property to have to share half with the partner in a fleeting marriage. Mr Pereira's arguments are buttressed by the fact that in Portugal itself, the laws have changed over the years and the default regime there — the one that governs if the parties do not stipulate a regime at the time of marriage — is that of separate property. Although this may work well in the Portuguese context, other lawyers feel that given the social structure, and the general level of autonomy, independence, awareness and education of women here, the Goan laws work well and should not be changed.

Increasing awareness about the Goan laws, even if it is only to stimulate debate, is an uphill task. Ms Naik admits that it is difficult even to find professors and experts to teach the intricacies of the local laws to Goan law students. Of all the resources with which we are blessed, knowledge and experience is one that we can scarce afford to squander. Maybe a systematic and concerted effort to study the Goan Family Laws is in order. In the light of the current debate on the Uniform Civil Code, the Goan laws could serve as a model for the entire nation.

(From, *The Lawyers*, July 1995).

5

Indira Jaising

Towards an Egalitarian Civil Code

SOMETIME LAST YEAR, a wealthy young Hindu asked his wife for a divorce. He had found another woman around town, who he suddenly decided to marry. He was willing to jettison his marriage of more than ten years, rejecting a wife and two children. A decent offer of settlement was not made. The wife refused. Then, he started planning his strategy. The man was well-connected and both husband and wife had common friends. One of their close friends was a hot shot Bombay lawyer. Obviously, the husband got to him first and the lawyer worked out the strategy: convert to Islam and marry, was the answer. With the blessings of the lawyer and the maulavi, the conversion and marriage took place. A reception at a Bombay 5 star hotel was attended by the city's bold and beautiful. The newly-acquired wife was a Delhi-based Hindu — so she too obviously had to convert to Islam. And so they went on their honeymoon, accompanied by their lawyer — an insurance against a snap law suit by the first wife -- and hoped to live happily ever after.

As if to spoil the fun, less than six months later, comes the Supreme Court judgement of Justice Kuldip Singh and Justice Sahai, to the effect that such a marriage was no marriage in law and the husband was liable to be prosecuted for bigamy. The legal wife will probably work out her own remedies but the point of relating this story is that this phenomenon is all too common among Hindus. Although polygamy for men was abolished in 1955 by the Hindu Marriage Act (and earlier in some states), the phenomenon of second marriage among Hindus is quite common. Obviously, the Hindu male has not adjusted to this change — after all, it has only been a few decades since the Hindu male lost his God-given right to marry as many times as he wanted. Statistics indicate that the phenomenon of multiple serial marriages is very common among Hindu men.

It is ironic therefore, to see the Bharatiya Janata Party (BJP) demanding the introduction of a Common Civil Code and the Muslims resisting it. One

of the largest beneficiaries of the absence of a Common Civil Code has been the Hindu community. The boot is really on the other foot — the judgement exposes the hypocrisy of the Hindu community rather than the so-called backwardness of Muslim Personal Laws.

There can hardly be any doubt that we have inherited our system of multiple Personal Laws from the divide-and-rule-policy of the British in pre-independence days. But why the system should continue to thrive in post-independence India remains a mystery. Perhaps it can only be explained as a continuation of the policy of divide-and-vote.

As if to obfuscate the issue, a strange debate is taking place in the press over the question of a Common Civil Code. Those who have misused it, the Hindus are demanding a change, as if it were a stick in their hands with which to beat the Muslims. Nowhere in the rhetoric of the BJP is there an acknowledgment of the fact that it is the Hindu men who have used the existing system to their advantage. Perhaps, if there was such an acknowledgment, the other community would be more willing for a change. And conversely, the community which has been used for such nefarious purposes has never questioned the validity of such bogus marriages and is now resisting the idea of a Common Civil Code. Both are playing their respective political games.

It is a pity that in all this, the voice of women is silenced. The only group that has a true interest in change and a Common Civil Code is women of all communities. It is time that we listened to their voices. The history of the last 10-15 years is full of cases of women of all communities each of whom have challenged in their own way, the Personal Laws applicable to them. Tribal women complaining of loss of inheritance, Syrian Christian women disinherited, Christian women complaining of non-availability of divorce, Muslim women protesting polygamy and Hindu women complaining of loss of coparcenary status and rights over the family home, have all gone to court and succeeded in establishing their claims. The climate of opinion among women is ripe for a change in the direction of a more egalitarian Personal Law and such a law can only be a common law for all women, regardless of caste, creed, community and religion.

It is therefore very amusing to follow the debate, if you can even call it that, over the issue. We have the usual Supreme Court lectures, (perhaps these periodic judgements come from the Supreme Court as it has no immediate political constituency or vote bank to lose), the usual round of BJP demands and Muslim protests and then the issue is put back into cold storage. What this indicates is that women have not yet consolidated themselves into a significant political constituency capable of raising issues in Parliament and pushing through legislation. The instruments of

empowerment created for that purpose have been blunted. The National Women's Commission has been rendered ineffective, either by making appointments which are political or by simply keeping the post of Chairperson vacant. Its recommendations are thrown in the thrash can. Earlier this year the Commission had recommended a common law for registration of all marriages with powers given to judges for distribution and division of marital assets. Nobody lobbied for the law and the recommendations are gathering dust.

While communities should be free to practice their religions and solemnise marriages in accordance with their own religious traditions, the civil consequences of marriage, cannot be left to religion. Rights to inheritance, maintenance, matrimonial home, alimony, marital assets and custody of children can and must be dealt with by civil law in accordance with acceptable egalitarian norms. What consequences follow on the breakdown of marriage for the wife? Does she have the right to the matrimonial home? Does she have a share in marital assets? What are her rights during the subsistence of the marriage? These are questions which affect all women equally regardless of religion. It is time they were addressed frankly, devoid of political and religious rhetoric.

Coming back to the story of the Hindu couple, they have a limping marriage, one that is recognised as valid by Islam but invalid by Hindu Law.

This only shows that our society has little or no respect for legal norms. Everybody who attended the marriage knew that the 'conversion' was a sham but were happy to play along with the wealthy couple. Until such social attitudes change, we will continue to have polygamy among Hindus, despite the moralistic rhetoric of the BJP.

The judgement of the Supreme Court categorically states that the second marriage is void. The beauty queen who married with such fan-fare is not a wife after all. Her efforts at legitimising her marriage have failed, eminent lawyers notwithstanding. The man is in danger to being prosecuted for bigamy. If only someone had told him that even before the Justice Kuldip Singh-Sahai judgement such marriages based on conversion as a convenience have always been considered illegal, he would have spared himself, his queen-bee-wife and his legal wife a lot of trouble. The real tragedy is that there is no social boycott of such marriages and no condemnation of such conduct. That such a marriage could have been planned by lawyers and attended by high society in the heart of Bombay, openly and not clandestinely, is the real tragedy and the true reason why we do not have a Common Civil Code.

(From, *The Lawyers*, June 1995)

6

Saumya

Bigamous Marriages by Hindu Men: Myths and Realities

SUPPORTERS OF THE UNIFORM CIVIL CODE (UCC) would vouch for the fact that an apparent object for enacting it would be to prevent polygamy among Muslim men, and to bring them "in line" with the practices of the majority community. The underlying presumption is that, subsequent to the abolition of polygamous marriages for Hindu men, brought about by the introduction of the Hindu Marriage Act, 1955, Hindu men have ceased to enter into polygamous marriages.

The rationale for the enforcement of the UCC assumes that the judiciary, the Supreme Court in particular, has strictly enforced monogamy on Hindu men, and that Hindu men have been law-abiding citizens subsequent to the abolition of polygamy among Hindus, and have strictly adhered to the rule of monogamy. It also supposes that conversion to Islam is the one and only avenue open to an errant Hindu husband, and that innocent Hindu men are being tempted and lured towards the evil of bigamy only because of the validity of polygamy among Muslims. Let us now test the veracity of these assumptions through an analysis of case law on the issue.

Supreme Court Sets a Negative Trend

The Supreme Court decided the first case of bigamy ten years after the abolition of polygamy for Hindu men.

In this case, Bhaurao married Indubai in 1956. Subsequently, while the marriage subsisted, he married Kamlabai in February 1962. Bhaurao as well as his two wives hailed from Maharashtra. Indubai filed a criminal complaint of bigamy against Bhaurao, his brother, Kamlabai, her father and others. Bhaurao and his brother were convicted by the Magistrate

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Court, Sessions Court and the Bombay High Court, while the others were acquitted. The brothers then appealed to the Supreme Court.

In the court proceedings, Indubai said that the marriage between Bhaurao and Kamlabai was in accordance with the custom prevalent in the community for gandharva form of marriage, popularly called a "Pat" marriage. She went on to describe the marriage ceremonies as follows: "Pat" (wooden sheets) were brought. A carpet was spread. The couple sat on separate wooden sheets beside each other. Puja was performed by bringing a *tambya* (pitcher), on which betel leaves and a coconut were kept. Garlands were exchanged. They then struck each other's foreheads, which was the binding part of the ceremony.

The court sought to determine the essential ceremonies of the gandharva marriage by referring to Mulla's *Hindu Law* (12th Edn., pg. 605), where it is stated: "the essential marriage ceremonies are as much a requisite part of this form of marriage as of any other unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste."

The court concluded that "saptapadi" and "homa" are the essential ceremonies of marriage. It then reasoned that in gandharva marriages too, performance of "saptapadi" and "homa" have to be proven, unless there is evidence that these two ceremonies have been abrogated by the custom prevalent in the community. By this logic, the Supreme Court concluded that Indubai had failed to prove that "saptapadi" and "homa" had been performed in the marriage between Bhaurao and Kamlabai, as a result of which that marriage cannot be considered legally valid. Thus, there could be no conviction of Bhaurao for bigamy.

The accused Bhaurao himself as well as some witnesses stated that in the gandharva form of marriage prevalent in the community, certain ceremonies are not required. However, the Supreme Court refused to conclude from these statements that the ceremonies performed between the husband and second wife are sufficient to hold the marriage valid.

The court also refused to presume a valid marriage in the light of the fact that Bhaurao and Kamlabai were living together as husband and wife. It said: "The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife."

This judgement sought to lay down the following principles:

1) The second marriage cannot be presumed in bigamy proceedings.

2).The second marriage has to be strictly proved.

3) Unless it is proved that "saptapadi" and "homa" were performed in the second marriage, there can be no conviction for bigamy.

4) Performance of "saptapadi" and "homa" have to be proved even in customary marriages, unless it can be conclusively proved that the custom had dispensed with the performance of the same.

5) From the fact of the man and woman living together, a valid second marriage cannot be presumed.

Supreme Court Seals the Fate of First Wives

While the Supreme Court laid down a rigid and high standard of proof for conviction in the case above, six years later, it further sought to consolidate its rigid stand on this issue in the following case. Priya Bala and Suresh Chandra married each other in 1948 according to Hindu rites, and lived together as husband and wife. Subsequently, Suresh Chandra began to ill-treat her, as a result of which she had to flee to her mother's residence. After successfully driving Priya Bala out of their home, Suresh Chandra married Sandhya Rani on May 31, 1962. Priya Bala then instituted maintenance proceedings against her husband. In these proceedings, Suresh Chandra admitted his second marriage to Sandhya Rani. Priya Bala then prosecuted Suresh Chandra and Sandhya Rani for bigamy, relying upon this admission.

Priya Bala also called upon the priest who performed the marriage between her husband and Sandhya Rani to court. The priest stated that marriage had been solemnised according to Hindu rites. Suresh Chandra denied having ever married Priya Bala, and said that even if he had, so long as she could not prove that he and Sandhya Rani had performed the essential ceremonies of marriage, he could not be convicted.

The Trial Court and the Sessions Court convicted Suresh Chandra on the basis of his admission of the second marriage. This was set aside by the Calcutta High Court. The Supreme Court relied on Bhaurao, and confirmed the acquittal on the ground that "saptapadi" and "homa" had not been proved to have been performed in the second marriage and conviction for bigamy cannot be based on the husband's admission of the marriage.

High Courts Follow Suit

The Supreme Court had laid down rigid principles for proving second marriages in Bhaurao, Priya Bala and Kanwal Ram, the last of which reiterated the principle that admission of the second marriage, in the absence of proof of essential ceremonies, would not result in conviction for bigamy. Now, the stage was set for the High Courts to churn out a spate of negative judgements.

A man named Phankari treated his first wife with cruelty, threw her out of the house and married again. In a complaint filed by the first wife, the only evidence available was that the parties had assembled at the village, and a priest officiated the marriage. The priest had not stated that he had performed "saptapadi" and "homa".

Both the Lower Courts convicted the husband on the ground that the second marriage was valid if there existed proof of performance of some ceremonies of marriage. In appeal, the High Court acquitted the husband on the ground that the second marriage must be performed by a form that is recognised by law, as otherwise there would be no difference between concubinage and a lawful marriage. Since the first wife could not produce evidence of performance of "saptapadi" and "homa" in the second marriage, the husband could not be convicted.

In another case, Ram Singh, ill-treated his first wife, Susila Bai, drove her out of the house, and then remarried. The Trial Court and Sessions Court convicted him. In appeal, the High Court acquitted the husband as the officiating priest deposed that he had performed "homa" and that mangalsutra was tied, but did not state anything about performance of "saptapadi". Hence the second marriage was not legally valid.

Logic Extended to Proof of First Marriage

While in the early years of introduction of monogamy for Hindu men, courts were willing to have a lower standard of proof of first marriages, with time, the High Courts began extending the principle of high standard of proof, consistently reiterated by the Supreme Court, to the first marriages as well. The following is an illustrative case:

During proceedings for bigamy, the husband admitted that he had married again while his first marriage was in existence. The Trial Court convicted the husband and the second wife. In appeal, the Sessions Court acquitted the accused on the ground that the first marriage has to be strictly proved.

The first wife appealed to the Bombay High Court. As expected, it re-affirmed the Sessions Court's view and said that the first marriage cannot be proved by an admission of the husband. It further went on to say as follows: "In a prosecution for bigamy, if a strict proof of the validity of the second marriage is required, it is not understandable as to why such a strict proof is not required for the first marriage also. If it is necessary for the first wife to prove all the essential requirements of a valid second marriage, then by the same standard and reasoning, it is necessary to prove all the essential requirements of a valid first marriage also."

High Standard of Proof for Customary Marriages

The second marriage need not be proved by "saptapadi" and "homa" alone; where the customs of the community dispense with these two ceremonies, conviction for bigamy may be secured by proving the customary ceremonies of marriage. However, the judiciary, with its rigid approach, has caused further damage by imposing a very high degree of proof for validating the custom.

In Assam, Boloram married Surjya in 1962 according to Hindu rites. In 1965, he remarried, this time according to the "Saklong" form of marriage which is customary among the parties, who were Ahoms. The evidence did not show as to what are the ceremonies which are performed in connection with a Saklong marriage.

The court referred to Gait's *History of Assam*, 1963, which described a Saklong marriage as follows: Bridegroom sits in the courtyard; the bride is brought in and she walks seven times round the bridegroom, then sits by his side. One end of the cloth is tied around the neck of the bride, the other fastened to the bridegroom's waist. They walk to a corner, where nine vessels full of water are placed on plantain leaves. The master of ceremonies reads from the "Saklong puthi". Three cups containing milk, honey and rice are produced, which the bride and groom have to smell. Some uncooked rice is brought in a basket, into which, after the couple has exchanged knives, rings are plunged, unknown to one another, it being the intention that each should discover the other's ring and wear it. The exchange of knives and rings is the binding part of the ceremony. The couple is then taken outside and they do homage to the bride's parents and people assembled, and the marriage is complete.

The courts have struck down Vysya marriage, Nair marriage of Kerala, Neo-Buddhist marriage of Maharashtra, Ghar Bethau form of marriage of Uttar Pradesh and an Arya Samaj marriage as invalid, by extending the high standard of proof to customary marriages.

Simplified Ceremonies not Recognised

With the dynamism of customs and traditions, many communities are consciously departing from the Brahminical ceremonies of "saptapadi" and "homa", the significance of which is dwindling for the lay person, and are resorting to simpler forms of marriages. However, when the validity of such marriages is questioned in courts of law, they are unable to withstand judicial scrutiny as the judiciary, ironically, measures the validity of these marriages by its antiquated yardstick of "saptapadi" and "homa" — the very ceremonies that these communities depart from. Some illustrative examples are as follows:

In a second marriage that took place among members of the Luhana caste in Gujarat, Vallabhadas, the husband, registered his second marriage at the caste organisation. Mukta Jesing, the first wife, relied on this piece of evidence to put her husband behind bars.

The Trial Court convicted the husband, but the Sessions Court and the High Court let him go scot free. They held that mere registration is insufficient to prove the validity of marriage, and that proof of performance of ceremonies was required even in this case, since no one had deposed that registration of marriage was the only requirement of a marriage within the community.

In another case, the second marriage had been performed according to Hindu rites and subsequently registered under the Special Marriage Act, 1954. The court held that the registration *per se* was only a declaration by the couple that they had undergone some ceremony of marriage prior to such a registration, and was no proof that "saptapadi" and "homa" had been performed by the couple. Therefore, proof of registration of marriage could in no way facilitate conviction for bigamy.

The cases above unfold the frequency of and the devious manner by which Hindu husbands violate the Hindu Law and enter into polygamous marriages. Further, the case law bears evidence to the fact that through the nonchalant, if not a distinctly anti women, attitude of the Judiciary, it has given a green signal to the Hindu husbands seeking to enter into bigamous marriages.

The Supreme Court's insistence on proof of performance of "saptapadi" and "homa" in second marriages acts as a double-edged sword. On the one hand, it facilitates devious husbands to omit these ceremonies in their bigamous marriages, and escape from the clutches of law. On the other, it subjects the first wives to immense hardship in gathering proof of the ceremonies in the second marriages, which are almost always clandestinely performed.

Further, when the first wife initiates bigamy proceedings in a court of law, the validity of her own marriage is called into question. By the judicial action of extending the rigid standard of proof to first marriages, through an absurd notion of equality, the first wife is unable to satisfy the high degree of proof required by the courts. Her marriage is then declared invalid. Such a judicial pronouncement would adversely affect her as her husband would use it against her if she were to subsequently file a civil case for enforcing her economic rights within marriage, such as maintenance and right to reside in the matrimonial home. Hence, it seems that the first wife is punished for prosecuting her husband in a court of law!

The courts have also made it extremely difficult, if not impossible, to prove a customary marriage. While the customs of the people have been dynamic, vibrant and metamorphic, differing from time to time and place to place, the judiciary has failed to keep pace with the dynamism, and has continued to use the same old yardstick for assessing the validity of contemporary customary forms of marriages, leading to disastrous consequences.

Further, it is appalling to note that the courts refuse to take cognizance of registration of marriages, even in the few cases where the husband, out of ignorance, registers the second marriage. These cases elucidate the anomaly between the Legislature and the Judiciary. While the Legislature is in favour of simplified forms of marriages, the Judiciary insists on proof of "saptapadi" and "homa" even in such situations.

It is obvious, then, that the judiciary has been persistently holding all marriages invalid — first marriages, second marriages, marriages performed according to Vedic rites, customary marriages as well as simplified forms of marriages. Hence, it appears that no marriage is a valid marriage in a prosecution for bigamy.

Thus the Judiciary has been imposing numerous obstacles in conviction of errant Hindu husbands for bigamy, through the garb of an increasingly higher degree of proof. These attempts of the Judiciary dispel the myth that it has zealously imposed monogamy on Hindu husbands. While allowing polygamy among Hindu men through the back door, by means of demanding an unrealistically high degree of proof, it advocates a Uniform Civil Code, ostensibly to prevent bigamous marriages among Hindu men. This is nothing short of judicial bigotry.

The case law is also indicative of the fact that Hindu men do not enter into bigamous marriages only through the route of conversion to Islam. They can and do violate the Hindu Law of monogamy even while remaining within the fold of Hinduism.

If after forty years of prohibiting polygamy among Hindu men, the goal is yet to be achieved, with what degree of certainty can one say that polygamy among Muslims will be effectively curbed by the Uniform Civil Code? What useful purpose could it serve, except to extend the ordeal of the Hindu wife to the Muslim wife as well, under the mirage of uniformity?

(From, *The Lawyers*, October-November 1995).

7

Chanda Nathani

Denial of Fundamental Rights to Tribal Women

IN ANCIENT DAYS, there was no codified law to govern society. Social relations were governed by custom. All the customs were male dominated. Customary laws hardly conferred any rights on women who had no right to express their wishes on questions such as divorce, succession and adoption. She was not entitled to claim divorce, even if the husband treated her with cruelty or kept a mistress or married any other woman. She was not entitled to remarry even if her husband died. She was not entitled to succeed to her father's property with other male heirs. The widow's life was miserable. She was not entitled to hold her husband's property as a full owner and dispose of or transfer it by way of sale, gift or will. All she had was a right of *Streedhan*.

Partly to remedy this situation, the Hindu Women's Right to Property Act, 1937 was passed. By this Act, the Hindu woman acquired a right in her husband's property after his death. This right was a limited one. She was not entitled to transfer or dispose of the property which she acquired after her husband's death. This Act was only a mirage for Hindu women, it did not make the dream of equal status a reality.

Post 1947

After independence, the Indian Constitution had recognised equal rights for Indian women. Article 15 of the Constitution declares that no discrimination will be made on the basis of religion, race, caste, sex and birth. Equal rights for Indian women were thus assured. Article 15 of the Constitution goes a step further and allows special provisions to be made for women.

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The Indian Government enacted many statutes to improve the status of Hindu women. The Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956 are some examples.

The Hindu Marriage Act, 1955 allowed Hindu women a right to claim divorce. This Act made monogamy the rule.

The Hindu Succession Act, 1956 did not confer on female heirs the right to ask for partition and therefore the Act requires to be amended. The Hindu Succession Act, 1956 provides equality in succession with male heirs. This Act abolished the concept of a limited estate and a Hindu woman became a full owner of property possessed by her.

Hindu women also acquired the right to adopt by the Hindu Adoption and Maintenance Act.

All these Acts improved the legal status of Hindu women.

Tribal Women Deprived

Though Hindu women acquired all these rights, there is still a class of women, namely tribal women, who though Hindus, were deprived of these rights by a specific provision in all these laws, which says that these laws will not apply to tribals unless the Central Government issues the necessary notification in the Official Gazette.

Though special constitutional rights have been conferred on tribals, most of these rights have benefited only tribal men and not women. Agricultural land has been restored to tribals by specific legislation and jobs are secured for them by declaring reservations. The status of tribal women however remains unchanged.

Unreformed Hindu Law Foisted

Customary law, which is in effect applied to tribals, is in fact the unreformed Hindu Law. Section 494 of the Indian Penal Code provides punishment for bigamy, but the person whose personal customs permits him to marry twice is not punishable. Tribal customs permit polygamy; therefore a tribal male cannot be prosecuted and convicted under this section.

A tribal woman is not entitled to succession rights of property from male heirs. The government is restricting the fundamental rights of tribal women in the name of protecting tribal culture.

It is not as if tribals are permitted to follow all their customs to protect their culture. Human and animal sacrifices, customary among the same

tribals, are punished under the Indian Penal Code and by the Prevention of Cruelty to Animals Act.

The distilling of liquor can be stopped by prohibition laws although it may be customary for tribals to distill. Yet customary laws which affect women adversely, are not abolished.

Many of the tribes mentioned in the Schedule to the Constitution, profess the Hindu religion and yet the above four Acts do not apply to them; instead, the unreformed Hindu Law applies. It is illegal and unconstitutional to discriminate against them by denying them the benefits of these new laws. Article 14 of the Constitution of India guarantees equality before the law and equal protection of the law to every citizen. Yet the tribal Hindu woman is discriminated against by not applying the above mentioned laws to her. These restrictive provisions are liable to be declared *ultra vires* of the Constitution of India.

If it is not possible for the government to apply the Hindu Acts of 1955-56 to tribals, then it is necessary to frame codified laws for the protection of the human rights of tribal women.

Some tribals may claim that their culture provides all the necessary customs to provide rights to tribal women. But in our precedent-following courts, it is impossible for a tribal woman to prove an uncodified, unwritten custom. Therefore it is the need of the hour to bring the (adivasi) tribal woman in the fold of codified law.

(From, *The Lawyers*, January 1989).

8

Lawyers Collective

Conflict of Penal with Personal Law

UNDER THE PRESENT LEGAL FRAMEWORK, the citizens of India are subject to the same laws and regulations except in regard to certain aspects of Civil Law — mainly Family Law and succession — where each religious community is permitted to be governed by its own distinct Personal Law. The Criminal Law, contained in the Indian Penal Code of 1860 and its procedural counterpart, the Criminal Procedure Code, is applicable to all citizens alike, irrespective of religion and creed. Of course, there are some provisions of the Indian Penal Code like the offence of bigamy (Ss. 494-495), which by inference, do not apply to Muslims. For instance, the Personal Law permits a Muslim male to be married to four women at the same time and these marriages will not be hit by S. 494 by virtue of the fact that the section contains the phrase 'under the law applicable'. If the Muslim male were to marry a fifth time while his earlier four marriages are subsisting, then the penal provision will be attracted.

Article 44 of the Constitution directs the state to enact a Uniform Civil Code for its citizens but has not laid down any guidelines or time limit for this. Pending the realization of such a code, the Constitution recognises the existence, and permits the continuation of the various Personal Laws. Such a situation inevitably gives rise to a conflict of laws from time to time and the last time this happened, in the Shah Bano case, it was resolved very unfortunately. Here, the clash arose between S. 125 of the Criminal Procedure Code (which provides for maintenance by the husband of his divorced wife till she remarries) and the rule of Muslim Personal Law which decrees that a husband is liable to provide maintenance to his divorced wife only during the period of *iddat* (a few days following the divorce) and not thereafter. The fundamentalists among the Muslims raised a furore claiming that their Personal Law was being contravened without their approval, and the fundamentalists among the Hindus responded by vigorously renewing their demand for the immediate enactment of a Uniform Civil Code for all, regardless of the views of the minorities. The

Rajiv Gandhi government, in its eagerness to please the fundamentalists and preserve its Muslim vote bank, passed the Muslim Women's (Protection of Rights on Divorce) Act which ousted the application of S. 125 of the Cr.P.C. to divorced Muslim women.

A conflict of the Criminal Law and the Muslim Personal Law once again arose in a case before the Bombay High Court recently. A minor Muslim girl named Khatija fell in love with a Muslim youth named Daud Hasan Mhalungkar and eloped with him in July, 1977 where they were married in Nikah ceremony. A complaint was filed against Daud and the Sessions Judge, Ratnagiri convicted him under S. 363 of the IPC on the charge of kidnapping Khatija, a minor, from the custody of her parents. Daud filed an appeal against this conviction before the Bombay High Court which came up for hearing before the Division Bench of Justices H.H. Kantharia and N.P. Chapalgaonkar.

On behalf of Daud it was contended that since Muslim Personal Law permits a Muslim girl who has attained puberty to marry a person of her choice, irrespective of her age, the act of removing such a girl from the lawful guardianship for such marriage could not be an offence in the eye of the law. Hence Khatija, who, though a minor had attained puberty, left the guardianship of her mother to go with the man of her choice in order to marry him. Hence this was lawful under the Muslim Personal Law and Daud's act of eloping with Khatija would not amount to the offence of kidnapping under S. 361 of the IPC. The judges rejected this contention and held that the subsequent marriage of Khatija to Daud would not absolve Daud of the criminal liability: the offence of kidnapping as envisaged by the IPC was complete the moment he enticed Khatija to leave the guardianship of her mother, because she was a minor for the purpose of the Indian Majority Act and for the purpose of S. 361 of the IPC. His subsequent marriage to her would not exonerate him of his crime.

The court further ruled that unless the statute makes an exception specifically, the Personal Law would not override the statutory provision. Muslims are entitled to the same protection of the law as persons belonging to other religious communities. A minor is likely to be misled and abused and therefore, the law has made the provision of penalising kidnapping.

Despite this ruling, however, the court felt that in the present case no useful purpose would be served by sending Daud to prison in view of the fact that Daud and Khatija are living happily with their children since many years. Accordingly, the sentence of imprisonment was substituted with imprisonment for a day and a fine of Rs 500.

(From, *The Lawyers*, May 1993).

Part Two

Marriage and Divorce

9

Nilima Dutta

Divorce Under Different Personal Laws

MATRIMONIAL LAWS IN INDIA are strongly linked to religion and reliefs are granted to reflect the religious dogmas prevailing, resulting in inequitable remedies to parties seeking judicial separation or divorce. Divorce by mutual consent is available under the Hindu Marriage Act, the Special Marriage Act and also under the uncodified Mohammedan Law but not under the Indian Divorce Act or the Parsi Marriage and Divorce Act.

The Special Marriage Act is the only central statute which allows any person domiciled in India to marry irrespective of his or her religious faith. Obviously therefore, persons married under this Act can avail of the more liberal modes of dissolving marriage not available under the respective Personal Laws of the parties.

At present, petitions for dissolution of a marriage have to be filed in different courts according to the law which is applicable to the parties. The implementation of the Family Courts under the Family Courts Act, 1984 will centralise jurisdiction but matrimonial reliefs will be granted under Personal Laws applicable to the parties.

There are certain matrimonial offences which entitle the aggrieved spouse to file for a divorce available under all or most of the matrimonial laws. These are cruelty, desertion, adultery, impotency or non-consummation of the marriage and bigamy.

Cruelty

Cruelty has been defined in the classic judgement of *Russel v/s. Russel* (1895 PD 315) as wilful and unjustifiable conduct of such character as to

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cause danger to life, limb or health, bodily or mentally, or as may give rise to a reasonable apprehension of such a danger.

In India, in *Dastane v/s. Dastane* (AIR 1975 SC 1534) the Supreme Court has held that cruelty does not have to be proved under principles of English Law but the Petitioner should be able to prove that the Respondent treated him or her with such cruelty that a reasonable apprehension is caused in his or her mind that it would be harmful or injurious for him to live with the Respondent.

Any conduct can constitute cruelty. An allegation made by the wife of her husband's impotency was also held to be the worst form of cruelty. This was held in *Shanti Devi v/s. Raghav Prakash* (AIR 1986 Raj 13), where the wife's accusation of her husband's impotency was considered not just a form of abuse, but a serious stigma on his manhood and bound to cause great mental agony and pain, resulting in cruelty to the husband. Further, the act of burning the doctoral thesis of her husband who was a lecturer also constituted cruelty.

In *Harbhajan Singh Monga v/s. Amarjeet Kaur* (AIR 1986 MP 41), threats of committing suicide by the wife, slapping her husband, keeping the husband waiting outside the door of the house on his return from office at times for half an hour, were held to be cruel behaviour.

The court has to decide the single question whether the Respondent has so behaved that it is unreasonable to expect the Petitioner to live with the Respondent. In order to decide this it is necessary to maintain facts in the petition relating to the impact of that conduct on the Petitioner [*Balraj v/s. Balraj* (1981) 11 Fam Law 110 AT 112 CA].

A single act of violence, neglect, coldness and insult whereby the Petitioner's health is injured, mental turmoil in the form of accusation of adulterous conduct, refusal of husband to allow his wife to have children all constitute acts of cruelty. Acts of cruelty must be specifically pleaded and evidence in corroboration must be led.

Desertion

Desertion is the deliberate forsaking or abandonment of a spouse and all marital obligations without reasonable cause. It is not a withdrawal from a place but from a state of things. Desertion involves two elements (1) a withdrawal of cohabitation (2) absence of consent of the deserted spouse. (*Labh Kaur v/s. Narain Singh* AIR 1978 P&H 317).

There can be no desertion without previous cohabitation by the parties or without the marriage having been consummated. Desertion, commences from the time the physical separation takes place and the intention to bring

cohabitation permanently to an end. A separation, however, may take place without there being an intention to end cohabitation permanently, or *animus deserendi*, as in the case of compulsory separation, but if that *animus* supervenes, desertion will begin from that moment unless there is consent to the separation by the other spouse.

Desertion is not determined by the act of leaving the house first. The spouse who compels the other to leave the matrimonial home by words or conduct would be guilty of desertion although it is the latter who has physically separated and left the house [*Parihar v/s. Parihar* AIR 1978 Raj 140].

Adultery

When one spouse has voluntary sexual intercourse with a person of the opposite sex who is not the husband or wife, during the subsistence of the marriage, then he or she is guilty of the offense of adultery [*Clarkson v/s. Clarkson* (1930) 46 TLR 626]. For adultery to exist there has to be voluntary sexual intercourse between a married person and another who is not the spouse.

Adultery is difficult to prove because of the secrecy usually involved. So direct proof of adultery is very rare. Adultery is proved based on circumstantial evidence; evidence of visits to a brothel, contracting venereal disease from a person other than the Petitioner and admissions and evidence of non-access and birth of children.

In *Hargovind Soni v/s. Ramdulari* (AIR 1986 MP 57) while considering the husband's petition for divorce on the ground of his wife's adultery, the court relied on a blood grouping test to establish the disputed paternity of a child as good circumstantial evidence.

To obtain a divorce on this ground, the Petitioner should give particulars such as the person with whom adultery (co-respondent) was committed and dates, places and times. The co-respondent should also be made a party to the petition.

Impotency

Impotency means incapacity to consummate the marriage i.e. to have sexual intercourse which is one of the objects of the marriage. (*R. Varghese v/s. T.J. Ponnen* AIR 1968 Ker 129). Impotency does not signify sterility but incapacity to have normal sexual intercourse. (*Shevanti v/s. Bhaurao* AIR 1971 MP 168). In order to determine whether impotency existed at the time of the marriage, the courts have to take into consideration future medical and surgical treatment which may rectify the disability to have

sexual intercourse. In case impotency can be cured without causing harm to the person suffering from it, the courts will provide an opportunity for such treatment before proceeding to grant a decree on the ground of impotency. [*S. v/s. S.* (1954) 3 All ER 736].

Whereabouts of Respondent Unknown For Seven Years

To obtain a divorce on this ground, the Petitioner must prove that for a period of seven years or more, the whereabouts of the Respondent have not been known to the Petitioner or any of the Respondent's relatives or friends who in the normal course would have heard from him or her.

Rape, Sodomy or Bestiality

The wife may present a petition for a divorce on the ground that her husband has been guilty of rape, sodomy or bestiality since the solemnisation of the marriage. Rape is forced sexual intercourse by the husband with another girl or woman (not being his wife). Rape is defined u/s 375 of the Indian Penal Code. The Indian Penal Code does not recognise marital rape. Sodomy and bestiality are acts of unnatural intercourse and a divorce can be granted to the wife on these grounds. The petitioning wife can plead that she herself was sodomised although she cannot plead that she was raped.

Non-Cohabitation After Obtaining Decrees of Judicial Separation or Restitution of Conjugal Rights

Cohabitation means living together as husband and wife and behaviour towards each other as spouses. If the spouses have obtained decrees of judicial separation or restitution of conjugal rights but do not resume cohabitation for a period of one year or upwards, then this non-cohabitation becomes a ground for divorce.

Mutual Consent

The amended Hindu Marriage Act, and the Special Marriage Act recognise that parties to a marriage may be incompatible and allow dissolution of a marriage, when both parties declare that they are unable to live together and mutually agree to the divorce. A period of living separately for one year is required prior to the filing of the petition.

The courts will not dispose of the petition for six months immediately following the mutual consent petition presumably to give an opportunity to the parties to change their minds.

In *Jayshree Londhe v/s. Ramesh Londhe* (AIR 1984 Bom 302) the question of withdrawal of consent by one of the parties arose before the court. The judge held that there cannot be any abandonment of a petition

filed u/s 13B of the Hindu Marriage Act without the consent of both parties and permission to do so would nullify the purpose of a joint application.

In *Nachhattar Singh v/s. Harcharan Kaur* (AIR 1986 P&H 201) the court held that a mutual consent petition cannot be dismissed as withdrawn at the instance of one party. Both parties must ask for the withdrawal.

Leprosy/Venereal

If the Petitioner has contracted leprosy or venereal disease from the Respondent, this constitutes undue hardship and suffering and is a ground for divorce.

Cruelty and Desertion

Under all five matrimonial acts, cruelty and desertion are grounds of divorce. The Hindu Marriage Act, 1955, the Special Marriage Act, 1954 and the Parsi Marriage and Divorce Act, 1936 allow both parties to petition for a divorce on the grounds of cruelty which may be physical or mental cruelty or both. The Dissolution of Muslim Marriage Act, 1939 which provides grounds for divorce exclusively to the Muslim wife, also includes cruelty.

The only Act which does not allow the wife to obtain divorce on grounds of cruelty alone is the Indian Divorce Act, 1869. The wife has to prove that her husband was not only cruel but that he also had voluntary sexual intercourse with some person other than his spouse, to claim a divorce.

Desertion is again a common ground of divorce under all the Personal Laws. Under the Hindu Marriage Act and Special Marriage Act, desertion for a period of two years is sufficient to constitute a ground of divorce. However, under the Parsi Marriage Act, the period of desertion has to be three years. The Christian woman has to again prove dual matrimonial offences by her husband, viz. adultery coupled with desertion.

The Muslim wife can obtain a divorce if her husband has deserted her for four years or more. However, there is an onerous qualification — the decree of divorce is not effective for the first six months. If the husband appears in person or through an agent within these six months and satisfies the court that he is willing to perform his conjugal duties, the decree shall be set aside.

Adultery

Adultery is again a ground which is not available equitably under the different Personal Laws. The Christian male can easily obtain a divorce on

proof of his wife's adultery whilst she cannot get a divorce unless she proves her husband's adultery combined with another offence such as cruelty, desertion, bigamy or incest. Adultery is not a ground of divorce under the Dissolution of Muslim Marriage Act.

Insanity

Incurable insanity or unsoundness of mind is another ground of divorce available under all the Personal Laws except under the Indian Divorce Act. The Parsi Marriage and Divorce Act while providing this ground also stipulates that the plaintiff should have been ignorant of the fact of the defendant's insanity at the time of the marriage and that the suit must be filed within three years of the date of marriage.

Leprosy and Venereal Disease

Leprosy is another ground available under all acts except the Parsi Marriage and Divorce Act and Indian Divorce Act.

The latter Act prohibits Christians from obtaining a divorce even if they suffer from venereal diseases.

The Hindu Marriage and Special Marriage Acts stipulate that the Respondent should have been suffering from venereal disease(s) in a communicable form. The Parsi Marriage Act requires the defendant to have transmitted a venereal disease to the plaintiff. The Muslim wife can obtain a divorce if she proves that her husband is insane or has leprosy or venereal disease for two years.

Not Heard of For Seven Years

Disappearance of one spouse for a period of seven years or more is a ground for annulment of the marriage under the Hindu Marriage and Special Marriage Acts. The period of disappearance has to be only four years under the Dissolution of Muslim Marriage Act and can also be construed as the offence of desertion described earlier.

Apostasy

Apostasy or conversion to another religion has been included as a ground for divorce under the Hindu and Parsi laws. It is not available under the Special Marriage Act because that would defeat the purpose for which it was enacted i.e. facilitation of inter-religious marriages.

Under uncodified Muslim Law the husband's apostasy automatically dissolves the marriage although this ground is not available under the Dissolution of Muslim Marriage Act. Hindu Law provides for a divorce on

the ground of renunciation of the world by entering some religious order. This is peculiar to Hindu Law.

No Cohabitation After Judicial Separation and Maintenance

If a decree of judicial separation has been passed and there has been no cohabitation for a period of one year or more between parties to a marriage such a decree forms a ground of divorce for both parties under the Hindu Marriage Act and also the Parsi Marriage & Divorce Act. The Special Marriage Act permits the wife to file a petition for divorce on this ground also. However, it is not available under Christian and Muslim Law. When an order of maintenance is passed against the husband in favour of the wife and there is no cohabitation for a year or more the wife can get divorce under Hindu Law, and the Special Marriage Act.

Mutual Consent

Divorce by mutual consent is available under the Hindu Marriage and Special Marriage Acts when both parties petition for divorce on the ground that they have been living separately for one year, they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Divorce by mutual consent is possible under uncodified Mohammedan Law.

Bigamy is recognised as an offence under the Hindu, Christian and Parsi Law. There are some qualifications to obtaining a divorce on this ground. Hindu Law takes cognisance of a bigamous marriage by the husband prior to the enactment of the 1955 Act. A second marriage after 1955 is void *ab initio.* A similar provision exists in the Special Marriage Act. A Christian woman can seek a divorce on grounds of her husband's adultery coupled with bigamy. Under Parsi Law, both parties can seek a divorce on the ground of bigamy provided that the suit for dissolution should be filed within two years of knowledge of the fact.

Sexual Offences and Imprisonment

Rape, sodomy and bestiality are grounds of divorce available exclusively to the wife under Hindu and Christian Laws as also under the Special Marriage Act. Both parties can avail of this ground under Parsi Law. Imprisonment of the Respondent/Defendant for a period of seven years or more constitutes a ground of divorce under the Special Marriage Act and also under Parsi and Muslim Laws. Parsi and Muslim Laws require that the imprisonment sentence should be made final.

Impotency and Non-Consummation

A marriage is voidable on grounds of impotency/non-consummation of marriage under Hindu Law, Parsi Law, Special Marriage Act and under the Dissolution of Muslim Marriage Act. Further, under Parsi Law, if the wife was pregnant at the time of the marriage and the husband was unaware of the fact, he can sue for divorce within two years of the date of the marriage. However, no matrimonial intercourse should have taken place since knowledge of the fact.

Uncodified Law

The Dissolution of Muslim Marriage Act provides grounds of divorce exclusively to the woman. In addition, under uncodified Muslim Law both parties can dissolve their marriage by mutual consent called *Mubara'at*, the husband can divorce his wife at will or *talaq* orally or in writing and the wife can divorce a husband under an agreement giving her the power to divorce her husband called *talaq-i tafweez*. Another consent divorce is the *khula* divorce where the wife agrees to give a consideration to the husband for dissolution of the marriage.

Repudiation

A woman married before the age of fifteen can repudiate her marriage before attaining the age of eighteen under Hindu and Muslim Law.

There are striking similarities in the various grounds of divorce available under different Personal Laws and yet there are several differences already discussed above. Discriminations in the various Personal Laws can be abolished only with the implementation of a Common Civil Code.

From, *The Lawyers*, January-February 1987

Grounds Of Divorce Under Various Acts And Parties To Whom Available					
Ground	**Hindu Marriage Act, 1955**	**Special Marriage Act, 1954**	**Parsi Marriage And Divorce Act, 1936**	**Indian Divorce Act, 1936**	**Dissolution of Muslim Marriages Act, 1939**
1) Cruelty	To both	To both	To both	Not Available to wife when coupled with adultery.	To wife only
2) Adultery	To both	To both	To both	To husband only, To wife with another offence	None
3) Desertion	To both	To both	To both	Coupled with adultery (to wife)	None
4) Incurable insanity	To both	To both	To both	Not available	To wife
5) Leprosy	To both	To both	None	Not available	To wife only
6) Venereal diseases	To both	To both	To both	None	To wife only
7) Disappearance	To both	To both	None	None	None
8) Conversion to another religion	To both	None	To both	To wife only	None
9) Renunciation of the world	To both	None	None	None	None
10) No Cohabitation for one year after judicial separation/ maintenance order	To both	To wife	To both	None	None (but available under uncodified Muslim Law)
11) Mutual consent	To both	To both	None	None	
12) Bigamy	To wife	To both	With adultery (to wife)	None	
13) Rape, sodomy or bestiality	To wife	To wife	To both	To wife	None
14) Repudiation of marriage before attaining majority	To wife	Not applicable	None	None	To wife
15) Imprisonment for seven years or more	None	To both	To both	None	To wife
16) Impotency/ non-consummation of marriage	Marriage voidable (to both)	Voidable (to both)	To both	None	To wife
17) Fraudulent consent	Voidable (To both)	None	None	None	None
18) Pregnancy at time of marriage	Voidable (to husband)	None	To husband	Not available	None

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Nilima Dutta

Dissolution of Marriages and Other Remedies

THERE IS NO COMMON LAW governing marriage and divorce in India. Personal Law applies for marriage and divorce. Personal Law is that which is based on religion or caste. Thus Hindus, Sikhs, Jains and Buddhists are governed by Hindu Law, Muslims by Muslim Law and people of other communities by their Personal Laws. The law permits one spouse to apply for a divorce when certain matrimonial offences such as desertion, cruelty, adultery, amongst others, are committed by the other spouse. When there is no fault committed but parties want to mutually dissolve the marriage, divorce by mutual consent is available to Hindus, Parsis and persons married under the Special Marriage Act.

1. The Special Marriage Act, 1954

The Special Marriage Act, 1954 applies to all citizens of India and any person irrespective of religion can be married and/or divorced under this Act. Persons already married under any other law can register their marriages under the Special Marriage Act, 1954 so that they can take advantage of its provisions. Muslims and Christians who register their marriages under this Act can avail of divorce by mutual consent which is forbidden under their Personal Laws.

The grounds for divorce available to both husband and wife are:

1) Adultery. 2) Desertion: For a period of two years. 3) Imprisonment for seven years or more. 4) Cruelty. 5) Mental disorder/unsoundness of mind. 6) Venereal diseases: Should be in a communicable form. 7) Leprosy. 8) Disappearance for seven years. 9) Non-cohabitation for one year or more after obtaining a court order for judicial separation/restitution of conjugal rights.

Grounds for divorce available only to the wife:

1) Rape, sodomy or bestiality by the husband. 2) A court order of maintenance followed by a one year period of separation or non-cohabitation. 3) Non-cohabitation for one year after getting a court order for judicial separation or restitution of conjugal rights.

Divorce by mutual consent:

Available to husband and wife jointly.

II. Hindus

If you are Hindu, the Hindu Marriage Act of 1956 applies.

The grounds that are available to both husband and wife are:

1) Cruelty. 2) Adultery. 3) Desertion: The period of desertion should be at least of two years. 4) Conversion: From Hinduism to any religion. 5) Mental disorder/unsoundness of mind. 6) Leprosy: If incurable. 7) Venereal diseases: Should be in a communicable form. 8) Renouncing the world for a religious order. 9) Disappearance for seven years or more. 10) Non-cohabitation for one year or more after obtaining a court order for judicial separation/restitution of conjugal rights.

Grounds available only to the wife:

1) Bigamy. 2) Deviant sexual conduct: Rape, sodomy or bestiality by the husband. 3) A court order of maintenance to the wife, followed by a period of non-cohabitation of one year. 4) Repudiation of the marriage.

Divorce by mutual consent:

Available to husband and wife jointly.

III. Parsis

If you are a Parsi, the Parsi Marriage and Divorce Act, 1936 applies.

Grounds available to both husband and wife are:

1) Refusal of one spouse to have intercourse for at least one year since the marriage. 2) Cruelty. 3) Grievous hurt. 4) Imprisonment for more than seven years. 5) Desertion for two years. 6) Venereal disease contracted from the spouse. 7) No intercourse for one year after an order for judicial separation, restitution of conjugal rights or maintenance has been passed by a court. 8) Conversion to another religion. 9) Adultery, bigamy or an unnatural offence. 10) Mental disorder/unsoundness of mind. 11) A court order of maintenance followed by a period of non-cohabitation for two years or more.

Grounds available only to the husband:

Pregnancy of the bride by some other man. The husband must file for divorce only if he was unaware of the wife's pregnancy, and within two years from the date of marriage. No martial intercourse should have taken place after the knowledge of the pregnancy.

Grounds available only to the wife:

1) Rape by husband of another woman. 2) Husband forcing wife into prostitution.

Divorce by mutual consent:

Available to husband and wife jointly,

IV. Christians

If you are a Christian, the Indian Divorce Act, 1869 provides the following grounds:

Grounds available only to the husband:

The husband can file for divorce only on the grounds of the wife's adultery.

Grounds available only to the wife:

1) Incestuous adultery. 2) Bigamy with adultery. 3) Marriage with another woman with adultery. 4) Rape, sodomy or bestiality. 5) Adultery with cruelty. 6) Adultery with desertion of two years or more. 7) Conversion from Christianity and marriage with another woman.

V. Muslims

Muslim men can divorce their wives under Mohammedan Law by pronouncing the word 'talaq' in the manner prescribed under the said law. There is no similar power given to the Muslim wife to divorce her husband in Mohammedan Law. If you are a Muslim woman the Dissolution of Muslim Marriages Act, 1939 provides the following grounds:

1) Disappearance of the husband for four years. 2) Lack of maintenance for two years. 3) Imprisonment for seven years or more. 4) Impotence of the husband. 5) Insanity for two years. 6) Leprosy. 7) Venereal diseases. 8) Repudiation of the marriage. 9) Cruelty. 10) Failure to perform marital obligations for three years.

Given below (following page) is an explanation of some of the terms used above:

Divorce by mutual consent:

Both husband and wife must file a petition jointly on the grounds that: 1) they have been living separately for one year; 2) they have not been able to live together; and 3) they have agreed to dissolve the marriage.

Cruelty:

This ground is available under all the four Personal Laws and the Special Marriages Act, 1954. Cruelty can be either mental, physical or both. Cruelty has been defined by different judges to be generally such behaviour which makes it impossible or unreasonable for the innocent spouse to continue living with the other person. For example — beating, neglecting, harassing, demanding dowry, making false allegations of immoral behaviour have all been considered examples of cruelty which entitle a woman to divorce. The instances of cruel conduct must be stated in the petition. Cruelty has to be proved by one's own evidence, evidence of witnesses and by medical certificates and photographs where there is physical injury.

Desertion:

Desertion does not mean only a physical separation of the spouses. If one person in a marriage refuses to have sexual relations with the other or does not carry out the obligations of marriage he/she has deserted the spouse, even if the parties continue to live under the same roof. The usual period of desertion is two years. Desertion can also take place, either when the husband leaves the house or drives the woman out of his house. If his behaviour is such that she is forced to leave the house, for example if her life is in danger, or if he asks her to get out, he is said to have deserted her.

Adultery:

Adultery has been defined as sexual intercourse with a person other than the spouse. Adultery is usually proved by circumstantial rather than direct evidence. If you know the name of the person with whom your husband has adulterous relations, she must also be made a party to your petition.

Insanity:

Insanity is a ground for divorce under all the Personal Laws except for Christians. The person alleging insanity must prove that the other person suffers from incurable unsoundness of mind or has a mental disorder which makes it impossible for the parties to live together.

Deviant Sexual Conduct:

Rape, sodomy and bestiality are grounds of divorce available exclusively to the wife under the Hindu and Christian Laws and also to the wives married under the Special Marriage Act. Both husband and wife if they are Parsis, can file for divorce on these grounds. (Since marital rape is not an offence, the wife can file for a divorce only if the husband has raped another woman).

Imprisonment:

The person has to undergo a sentence of imprisonment of seven years for an offence under the Indian Penal Code. (Some of the offences for which seven years imprisonment may be given are rape, murder and kidnapping).

Rejection or repudiation of marriage:

A woman who is married before the age of 15 can refuse to continue with the marriage before she turns 18. This is known as repudiation. A Muslim woman must repudiate her marriage before she turns 18, provided she has not had intercourse with her husband. A Hindu woman can repudiate her marriage even if she has had intercourse with her husband. This ground allows women, who have been forced into 'child marriages', to make a choice when they reach the age of 18.

Judicial separation:

A court gives its orders allowing the husband and wife to live separately from each other on the grounds of adultery, cruelty, desertion etc. although the marriage continues. Such an order is called an order of judicial separation.

Restitution of conjugal rights:

An order for the restitution of conjugal rights is given by the court and allows parties to live together as husband and wife when one spouse has separated from the other for no good reason.

Maintenance:

For the purpose of obtaining a divorce, an order of maintenance is an order providing money to the spouse in order to meet his/her daily needs such as food, clothing, shelter.

Note: If any of the above three orders i.e. judicial separation, restitution of conjugal rights and order of maintenance (more details provided later in the book) has been given by the court and despite the order the persons have

been living apart for a year without cohabitation, this living apart becomes a ground for divorce (except for Christians).

Void and voidable marriages:

A void marriage means one which, in law, does not exist at all. It does not require a court order or a decree to annul it. However, it is always advisable for a woman to file a petition and have her marriage declared void to avoid ambiguity about her status to ensure that she does not face any legal problems if she marries. A voidable marriage is a legal marriage and must be annulled by a court of law.

For Hindus:

The marriage is null and void:

1) If after 1956, either party marries a second time, without ending the first marriage.

2) If the spouses are closely related to each other, unless their customs allow such marriages.

Voidable marriage:

The marriage can be annulled when:

1) Either the husband or wife is impotent and there has been no sexual intercourse between spouses.

2) The husband or wife has consented to the marriage although he/she is of unsound mind.

3) The consent has been obtained by force or fraud.

4) The wife was pregnant at the time of the marriage by some other person and the husband was unaware of the fact.

For Christians:

Christians can have their marriages declared null and void only by an order of the court. The grounds for getting such an order are:

1) Impotence.

2) Persons are closely related by blood or marriage.

3) Insanity or unsoundness of mind.

4) The current marriage is bigamous.

5) Consent of either party was obtained by force or fraud.

For Parsis:

If the spouses have not been able to have sexual intercourse due to natural causes, the marriage can be declared null and void.

Note: Persons married under the Special Marriage Act, 1954 can have the marriage annulled on grounds which are similar to those available under the Hindu Marriage Act, 1956.

Children of annulled marriages:

Children of marriages which are declared null and void are treated as legitimate. In general, where property rights are concerned, a child of a marriage which has been declared null and void can inherit property owned by the parents. The reasoning behind this provision is that innocent children should not suffer because their parents have entered into a void marriage.

Other Legal Remedies for Marriages

A marriage can break down for several reasons. Divorce is not the only solution or remedy for marital disputes. The husband or wife can approach the court for orders of judicial separation or for restitution of conjugal rights. Any proceedings filed in court for separation, restitution, annulment or divorce are called matrimonial proceedings. A person seeking divorce or any of the other remedies is stated to be asking for matrimonial reliefs.

A wife can file applications for maintenance and custody of children even if the husband has filed matrimonial proceedings against her and these applications will be considered part of the proceedings. In places where there are Family Courts, independent or separate application can be made for matters regarding property, custody of children and other reliefs without filing matrimonial proceedings.

Restitution of conjugal rights:

When two persons are legally married, they have a duty to live together as husband and wife and cohabit with each other. If one spouse, without a good excuse fails to live with the other, the innocent spouse can file a suit for restitution of conjugal rights.

He/she has to prove that the other person:

1) stopped cohabitation; 2) there was no reasonable cause for doing so; 3) there is no legal ground on which the court can refuse relief.

However, if the wife has been guilty of adultery or cruelty or any other matrimonial fault, she will not be able to succeed in a case for restitution.

If the parties fail to cohabit for one year after the order of restitution, this non-cohabitation becomes a ground for divorce, except for Christians.

Hindus, Christians, Parsis and persons married under the Special Marriage Act can apply for restitution of conjugal rights. There is no law allowing restitution of conjugal rights to Muslims married under Mohammedan Law.

Judicial separation:

Sometimes a married couple may not want a divorce but may still want to live apart and not cohabit. A court order allowing this is an order of judicial separation, Hindus, Parsis, Christians and persons married under the Special Marriage Act can apply for judicial separation under their respective marriage laws.

For Hindus:

Any of the grounds for divorce under the Hindu Marriage Act is a ground for judicial separation.

For Parsis:

Any of the grounds given for divorce under the Parsi Marriage and Divorce Act is a ground for judicial separation.

For Christians:

Judicial separation can be obtained on grounds of adultery, cruelty or a two year desertion.

Note: For persons married under the Special Marriage Act any of the grounds for divorce given under the Act is a ground for judicial separation.

(From, *The Lawyers*, March 1992).

11

Nilima Dutta

Women's Rights on Breakdown of Marriage

ON A BREAKDOWN OF MARRIAGE the woman is forced to seek several legal remedies to ensure reliefs such as a right to stay in the matrimonial home, maintenance for herself and minor children if any, as well as custody of the children. This article examines the various remedies available to a wife on breakdown of the marriage and also names the agencies which can be approached for reliefs.

Police Protection

The first problem (one which often assumes nightmarish proportions) which a woman faces, is that of her physical security. Under S. 149 of the Criminal Procedure Code, 1973 every police officer can intervene to prevent the commission of a cognisable offence. Under S. 151, a police officer can make a preventive arrest i.e. arrest a person without the order of a magistrate and without a warrant if he comes to know that a cognisable offence may be committed. This provision can be used when there is violence against a woman. If the husband has caused the wife grievous hurt or wrongfully confined her, these constitute cognisable offences under the Indian Penal Code. Unfortunately, even if the husband has beaten the wife with a belt or kicked her, the police treat it as a domestic quarrel and register the offence as a non-cognisable one. In stranger-stranger assaults, the police act more promptly. It is essential that women who are battered insist that the complaints be taken seriously and the police register the offence.

Further, criminal law provides for punitive proceedings which may be resorted to in order to pressurise the husband or his family to return dowry and other items of *Streedhan*. Under S. 498 of the Indian Penal Code (IPC) which is a cognisable, non-bailable offence, a husband or any of his relatives can be imprisoned for up to 3 years and may also be fined if they

have been guilty of extreme cruelty to a woman, whether physical or mental. Unfortunately, this provision has been interpreted by the police as cruelty stemming from demands for dowry or property, and so they often fail to register a complaint under this section when the woman complains of being beaten or harassed.

Right to Reside in Matrimonial Home

Along with her physical security, the other immediate concern for an abandoned wife and the children, is a place of shelter. It is very common to find victims of violence being thrown out on the streets by battering husbands at any time of the day or night. It is usually impossible for the woman to re-enter the home forcibly, as it is not possible for her to overcome the physical strength of the husband and/or in-laws.

The first thing the woman should do is contact a women's organisation and/or the nearest police station and lodge a complaint. In recent times, the police in urban areas have helped the woman to re-enter the home, but have advised her to obtain a protective court order protecting such re-entry. The next step is to approach a court of law and obtain an injunction for (a) a re-entry into the matrimonial home; (b) an order restraining the violent spouse from throwing the woman out of the matrimonial home; (c) a non-molestation order i.e. an order from the court restraining the violent spouse from harassing or molesting the woman in any manner whatsoever.

Injunction orders can be obtained under common law, the Specific Relief Act, 1963 and also the Civil Procedure Code, 1908. Temporary injunctions are granted by the courts under Order 39 of the Civil Procedure Code during the pendency of a suit or petition. Perpetual injunctions restraining a party from forever doing the act complained of, are given under Ss. 38 to 41 of the Specific Relief Act. Injunctions are granted at the discretion of the court.

Under English common law which also applies in India, principles of equity must be applied to guard a woman's right to reside in the matrimonial home. The woman by virtue of the marriage has a personal right to reside in the matrimonial home and not a proprietary right. In the English case of *Gurasz v/s. Gurasz* [1969 (3) All ER 82(2)], it was held that a man has no right to throw a woman out of the matrimonial home and a civil court has jurisdiction to reinstate the woman who has been thrown out.

Although in India there are no specific laws governing domestic violence and the right to reside in the matrimonial home, which provide specific remedies to a woman who has been ousted from the matrimonial home, courts in India have taken a view that they have an inherent general jurisdiction to grant reliefs.

Further, under S. 18(1) of the Hindu Adoptions and Maintenance Act, 1956 a Hindu wife is entitled to be maintained by her husband during her lifetime. It is implicit in this provision that the right to be maintained by the husband includes the woman's right to reside in a matrimonial home. Therefore an injunction can be granted under S. 18(1) to protect the woman's right of residence. Under S. 7(1)(d) of the Family Courts Act, 1984 an injunction can be granted to protect the wife's right to reside in the matrimonial home. Section 6 of the Specific Relief Act, 1963 permits a woman who has been dispossessed from the matrimonial home to file a suit for re-possession, within a period of 6 months. The woman does not have to show any title to the premises, but has only to prove that she was in possession singly or jointly with the husband.

English Courts have taken a radical view by granting an injunction allowing a woman and her children to continue to reside in the matrimonial home even after divorce proceedings have ended, to protect the interest of the minor children who would be rendered homeless.

Not only have courts recognised the right of a divorced woman to reside in the matrimonial home, but they have also recognised her right to oust the husband out of the matrimonial home which she did not own, in certain cases. In *Stewart v/s. Stewart* [All ER 1973], the wife was granted an order ousting the husband from the matrimonial home after the grant of divorce, although the wife did not own the home.

In the Indian case of *Banoo Daruwalla v/s. Jal Daruwalla* [1962 BLR 750], the wife asked for an injunction for ousting the husband on grounds of his cruelty to her. Although the court did not grant her an ouster injunction, it recognised its power to do so.

Procedure

Applications for injunctions are made by filing a suit in a Civil Court having jurisdiction. Court fees are usually less than Rs 100. *Ex-parte* orders can be obtained on grounds of urgency, but subsequently, the plaint has to be served on the opposite party.

Maintenance for Wife and Children

A common problem which prevents many wives of broken marriages from seeking reliefs such as divorce or judicial separation is the prospect of facing penury, as many women are financially dependent on the husband for even day to day needs. It is essential that courts ensure that women are granted interim monetary reliefs in order to maintain themselves during the pendency of the proceedings. There are different laws for obtaining maintenance, both criminal and civil.

Criminal Law

Under S. 125 of the Criminal Procedural Code, 1973, a wife, which term includes a divorced wife and also minor legitimate and illegitimate children, can make an application for maintenance to any Magistrate's Court where either of the parties are residing. Very nominal court fees are charged.

The maximum sum which can be claimed per person is Rs. 500 per month. Interim reliefs can be granted by the court if a *prima facie* case is made out for such relief. However, it has been found that courts are reluctant to grant the maximum amount unless there is adequate proof of the husband having a substantial income. Non-payment of the amount ordered, entitles the woman to apply to the court for distress warrants for attachment of the husband's property. Here the police can help in enforcing the orders.

Maintenance Under Civil Law

Provisions for maintenance are specifically made in most of the matrimonial statutes. Under S. 24 of the Hindu Marriage Act, 1955, interim maintenance can be paid to either spouse during the pendency of matrimonial proceedings. Under S. 25, the court can pass orders for permanent alimony and maintenance. Similar provisions exist in the Special Marriage Act, 1954, the Parsi Marriage and Divorce Act, 1936 and the Indian Divorce Act, 1869. In addition, the Hindu Adoption and Maintenance Act, 1956 allows the woman and her children to claim maintenance from the husband and failure to pay can result in attachment of property belonging to the husband and/or his family. In addition, a woman can claim maintenance under the Civil Procedure Code, 1908 by filing a suit against the husband. However, the court fees which are based on the value of the claim can be prohibitive and defeat the purpose of this remedy.

Enforcement of Decrees

When a party fails to comply with the decree passed against him/her, execution proceedings can be resorted to, by making an application in the requisite format to the same court which has granted the decree.

Under Order 21 of the Civil Procedure Code a decree for maintenance can be executed against the person or his property or both. The person who has obtained the decree is called a decree holder and the person who has to pay is called the judgement debtor. Execution against the person of the judgement debtor is made by arresting the person and detaining him in civil prison. Execution against the property, consists of attaching and selling the

property of the judgement debtor and paying the decree holder the amount from the sale proceeds. Under S. 151 of the Civil Procedure Code, the court has inherent powers to pass such orders to meet the ends of justice. Therefore, a court can insist that the woman be paid maintenance prior to proceeding with the husband's petition. Or a court can even stay proceedings in the interests of justice. The property of the person against whom the decree for maintenance has been obtained can also be attached or a charge made on it.

Custody of Children

Women usually face custody battles on the breakdown of the marriage as the husband and/or in-laws forcibly try to retain the custody of the children to emotionally blackmail the woman into submitting to their demands for a divorce or for dowry. A battered woman usually has more problems convincing a judge that she is capable of looking after the children herself. It is common for husbands to batter only the wife and not harm the children physically. If a woman is economically dependent, it is hard for her to claim custody of the children as the husband has to pay maintenance to support her and the children.

Judges very often find it difficult to comprehend the extreme fear and helplessness of a battered wife and may disbelieve the victim regarding the extent of physical cruelty. By the time the woman reaches court, her injuries have subsided and her composure in court belies the trauma she may have gone through.

In a recent matter which was heard before the City Civil Court, Bombay, the judge refused to believe that the husband had been violent to the wife and minor child and gave him access to the daughter although he had admittedly neglected to see the child for over two years.

Guardianship Under Law

The law on guardianship is governed by the Guardian and Wards Act, 1890 (GWA) and by Personal Law. The Hindu Minority and Guardianship Act, 1956 governs Hindus. Under S. 4(2) of the GWA, a guardian is defined as a person having the care of the person of a minor or of his property or both. The word "care" means more than custody, which is understood to be "physical keeping". Under Personal Law, the father is usually deemed to be the guardian of the legitimate child but courts have consistently looked at the welfare of the child and not rights of the guardian, when deciding guardianship and custody applications, very often overriding Personal Law. If a woman wants to make an application for custody of her minor children without resorting to matrimonial proceedings, she can make

an application under the GWA if she is a non-Hindu and under the other Act if she is a Hindu. Obviously the father or other persons can also make an application for guardianship and custody under the provisions of the above-named statutes.

Under S. 9 of the Guardian and Wards Act, 1890 the application for guardianship must be made to the court which has jurisdiction over the place where the minor resides. Interim applications should be made by the woman for continuing the custody of the child with her or for an order directing the husband to hand over the child to her custody. Indian Courts have followed the principle of "welfare of the child is the paramount consideration". Courts usually grant custody to the parent who has the child at the time the application is made in court. If the child is a minor girl, the mother is normally allowed custody. There is also a presumption that a very young child is better off with the mother. The factors taken into consideration are the financial status of the parents claiming custody, the home environment, the age of the child and the present school which the child is attending.

Although courts are expected to look into and decide which parent is more fit to have the child, as a matter of routine, they grant interim custody to the parent with whom the child is residing at the time of going to court. It is advisable for the woman to physically have custody of the child by taking police help or help from a women's organisation prior to making an application in court, failing which she will be forced to spend several months in court trying to get interim custody. By the time the case is heard, the child may have spent several months with the father or other relatives and the courts are unwilling to hand over the child to the mother on the ground that the child's schooling will be disrupted or emotional instability caused. The principle of possession being nine points of the law, applicable to property, seems to apply to the custody of children also.

Case Law in Guardianship

In *Jacob v/s. Jacob* [AIR 1973 SC 2090], the father made an application for custody of his children under S. 25 of the Guardian and Wards Act. The court ruled that the primary consideration was the welfare of the children and not the rights of the parents and granted custody of the children to the mother although the father was also a fit person.

In *Dolikuka v/s. Dolikuka* [AIR 1982 SC 1277] and in *Veena Kapoor v/s. Virender Kumar* [AIR 1982 SC 792], the courts again did not consider the rights of the guardians as governed by statute but looked at what the welfare of the child would be before awarding custody. In *L. Chandran v/s. Mrs Venkatalakshmi & Anr.* [AIR 1981 AP 1], the AP High Court stated

that the father does not have an unlimited right to claim the custody of the minor child without reference to the welfare of the minor child. The Petitioner's wife had expired and he had allowed the child to be brought up by her maternal grandmother. The father filed a writ petition under S. 226 for an order directing the grandmother to produce the child in court and have it handed over to him. The grandmother was given custody as she had looked after the infant child with love and affection. There was no adult female to look after the child at the father's house. The father was only given access to the child.

Recovery of Dowry Items and Other Property

It is common for a deserted wife to have all her valuable jewelry and gifts snatched by the husband and relatives. There is hope for women for recovery of such goods by filing a complaint under S. 406 of the Indian Penal Code for criminal breach of trust. In *Pratibha Rani v/s. Suraj Kumar* [1985 (2) SCC 370], the Supreme Court held that the wife was the absolute owner of the *Streedhan* property (property given to her at the time of her marriage) and the husband and in-laws who had misappropriated it after turning the wife and children out of the house, were guilty of the offence.

Criminal proceedings can be filed even if dowry has been demanded and not actually given. In *L.V. Jadhav v/s. Shan Karrao Abasaheb Pawar and Ors.* [1983 Cri. LJ 1501], Jadhav's daughter Anita was married on 19 June 1979 to Pawar's son Pradeep at Pune. During the marriage ceremony, the Pawars demanded Rs 50,000 under the pretext that the money was required for travel of the bridal couple to the USA. Anita was not sent to the United States and the Pawars persisted in their dowry demands. Jadhav filed a complaint under S. 4 of the Act on the ground that dowry had been demanded by the Pawars. The High Court of Bombay quashed the proceedings in the Magistrate's Court which were restored by the Supreme Court for trial in the Magistrate's Court.

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Gangatri Chakraborty

Divorce in Hindu Law: Realm Revisited

WHILE DISCUSSING DIVORCE one cannot ignore the institution of marriage. It is the most meaningful and intimate relationship between individuals. There is a bond between the persons whether the relationship is particularly beneficial or not. Consequently most persons who separate regret the breaking of this relationship no matter how unhappy and unfulfilled they felt in marriage.

Most societies define divorce as undesirable. On one hand there is the tendency to associate divorce with threat to the stability of the family and of society and on the other hand divorce is assumed to have grave consequences for the men, women and children caught up in it. Yet the institution of divorce is as important as the institution of marriage itself because it is a panacea for sick marriages. The rising rate of divorce also disproves the belief that basic institutions rooted in traditions and cultural mores such as marriage are extremely resistant to the changes imposed by law.

The industrial and scientific advancement and its accompanying stress and strain on human relations has contributed its share to the rising rate of divorce. At present the law relating to divorce is in an evolutionary state. Different charges are levelled by the spouses against each other while they indulge in a fault-finding game. Under the circumstances it is only proper to cast a glance at the real mechanics of divorce law.

Between the years 1955 and 1989 approximately three hundred cases of divorce were reported in the All India Reporter. There are various grounds of divorce under the Hindu Marriage Act, 1955. Common among

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them are: adultery, cruelty, desertion, mental disorder, leprosy, non-compliance of the order of restitution of conjugal rights even after the lapse of one year or more after the passing of the decree, sustained judicial separation and mutual consent. From a detailed analysis of the cause of action of the cases it appears that most of the cases are brought under the head of cruelty, adultery and desertion in that order. The remaining cases are divided under the other grounds of divorce, as seen in the table below:

Period	No.of cases	Adultery	Cruelty	Desertion	Mental Disorder
1955 to 1989	300	105	144	87	22
Leprosy	Non-Restitution		Sustained Judicial Separation		Mutual Consent
4	25		5		15

Cruelty — A Major Ground

If one considers grounds like dowry and irretrievable breakdown of marriage to be included under the ground of cruelty, then cruelty appears to be the most common reason. There are 23 cases filed due to harassment for dowry, and four cases for irretrievable breakdown of marriage. Therefore, under the ground of cruelty the number of cases is 144 + 23 + 4 = 171. This means that more than 50 per cent of divorce cases filed in the courts are on grounds of cruelty. If one looks deeply into the reason behind this, one will discover that both the statute and judicial activism are equally responsible for this state of affairs.

The statute does not define the word cruelty. Since there is no definite definition of the word, the judiciary has interpreted the word in a manner so as to include physical and mental cruelty. The effect of this is that the ambit of the word has been made so wide as to include any form of behaviour which may be found repugnant to the other partner, strictly depending upon the others endurance. Like every coin this too has two sides to it. This ground is used far too easily and frequently to dissolve a marriage. While the benefit goes mostly to the woman, it is also a fact that when used too easily and frequently against her, her very existence is jeopardised; for in the absence of economic independence and education, she becomes a virtual destitute often losing the custody of her children for the same reason. Therefore there should be some criteria or limit imposed upon the word cruelty so as to check its abuse.

The same seems to be the case with desertion as a ground of divorce. Statistics show that a substantial number of cases are filed under this ground. This reflects on the fact that in most cases there is a physical separation between the parties. Whether one partner is driven out or simply withdraws from the society of the other, the physical separation for one year or more ensures that a divorce case will be filed by the parties. The question of who is at fault comes at a later stage by which time the couple have reached a point of no return by hurling and rehurling abuses at each other.

This also brings us to the defective notion of fault or guilt in divorce proceedings. One cannot but admit that the real cause of divorce is seldom what is found in the plaint. The plaint constitutes a mixture of reality to which a generous amount of fiction is added by the litigating advocate. The basic approach in itself is wrong. In divorce there is no scope for guilt or fault. The couple is a victim of a situation where the economic, social, educational and psychological background of each has a lot to contribute. Where couples tend to overlook this and run away from each other, the situation is further precipitated as a fit case to be filed under the ground of desertion.

Adultery and Social Background

Adultery is another ground used very frequently to dissolve the marriage. The basic and fundamental reason why the rate of divorce is very high under this head, is that we are still under the strong influence of our ancient traditions and beliefs. When the question of adultery arises the social background of the parties cannot be ignored. The vital question is how the parties are accustomed to live in the given social background. Ordinarily the natural intermingling of opposite sexes cannot be looked down upon, especially in the modern jet set world. Yet the common middle class families still maintain a degree of conservatism. The unusual meeting of two persons in seclusion for any length of time amongst that class can justifiably lead to the inference of adultery.

The most difficult question involved in the cases of adultery is how and where to strike a balance between sexual promiscuity and modern intermingling. One cannot overlook the fact that such heterogeneous mingling may lead to innocent intimacy on the one hand or to an adulterous relationship on the other. The former is to be ignored and the latter is to be avoided. But it appears that the rule of probability has the last say and if circumstantially it can be proved that the parties have been indulging in an adulterous relationship, then there is sufficient ground to dissolve the marriage.

These three grounds also constitute the most vulnerable points of

divorce in Hindu Law and this vulnerability makes the position of women more precarious, instead of making her more secure.

The only cause for jubilation in the dismal scenario is that relatively more women are coming forward to file divorce cases against their spouses. Statistics show that of the total number of such cases almost 50 per cent are filed by women.

This means that women feel more secure socially and economically, educationally and psychologically to face the world on their own. It also shows that the woman is more aware of her rights now than she was before.

The courts have also contributed. Of the 300 cases mentioned earlier, more than 50 per cent have been decided in favour of women. The remaining 50 per cent is divided between cases which have been decided in favour of men, those which have gone in favour of both the spouses as in the cases of mutual consent and those whose decisions are still pending or have been referred back.

Emerging Patterns

Another interesting statistic shows that the maximum number of cases are filed in the Punjab and Haryana High Court followed by Delhi, Allahabad and Calcutta, in that order. Two factors are responsible for this. First, women in urbanised areas are more secure socially, economically, educationally and psychologically. Second, the stress and strain of the urbanised jet set world is more and more telling upon families and therefore such families are more prone to break up. This however is still a matter of debate and nothing definite can be said about it except to show a definite pattern.

The same theme is repeated in the Darjeeling district of West Bengal. Between the years 1984 and 1989 there have been about 242 divorce cases. Like the scene at the High Court and the Supreme Court, more than 60 per cent of the cases are divided between three chief grounds, namely, cruelty, adultery and desertion in that order. This means what holds good at the national and provincial level is true of a district also. Thus there is a uniform pattern but a point of deviation from the national level is seen in that more than 40 per cent of the cases are either dropped for default or for non-prosecution.

It is a dismal fact that almost nine out of ten couples involved in such cases continue to lead a life of deprivation in a state of de facto divorce without a decree of de jure divorce. The main reason for such a state of affairs is that a de jure divorce involves expenditure for litigation and also a substantial amount for maintenance and alimony. The result is that while

the women bear the yoke of life, men are relatively free to lead a life of their choice. It is easier for the men to eke out a living but the women are fettered. Therefore behind all the complacency and goodwill there is very little that the law has been able to do for the woman on the street.

Caste Background

An interview of 46 men and women who are either divorced or living in a state of de facto divorce has led to some interesting facts. Statistically speaking, out of the 46 persons interviewed, 26 were living in a state of de facto divorce and 20 had obtained a decree of divorce. When these cases are analysed on the basis of caste, one finds that of the 46 cases, 7 cases were from among the brahmins, 20 cases were from among the kayasthas, 2 cases from the vaishya and kshatriyas and fourteen from the scheduled castes. This indicates that in most cases people simply prefer to refuse to live together as husband and wife.

The reason behind such action maybe: 1) avoidance of the expenditure that is involved when a case is taken up in a court of law; 2) avoiding any responsibility regarding alimony and maintenance and expenditure related with it; 3) it may also mean that concerned parties are simply not aware of their rights under the law. The different number of divorce cases in different castes suggests that the scheduled castes benefited from the system of customary divorce. Therefore, a larger proportion of divorce cases from among them is not exceptional at all. The division of cases among the brahmins and kshatriyas is rather significant. Brahmins are still in a tight grip of Manu's orthodoxy, but others have successfully emancipated themselves and the number of cases is an expression of their socio-legal awareness.

Age Influences

An age-wise analysis of these 46 cases shows that in the age group of 15 years to 20 years there was a single case of divorce: 6 cases of divorce were filed in the age group of 21 years to 25 years; between 26 years and 30 years there were about 10 cases; between 31 and 35 years — 15 cases; between 36 years and 40 years -- 6 cases; between 41 and 45 years -- 4 cases; between 46 and 50 years there were 2 cases and between 51 and 55 years there were 2 cases. Graphically the result is as follows:

Total cases	15-20 yrs.	21-25 yrs.	26-30 yrs.	31-35 yrs.	36-40 yrs.	41-45 yrs.	46-50 yrs.	51-55 yrs.
46	1	6	10	15	6	4	2	2

It will be seen from the above that the maximum divorce cases are filed by men and women in the age group 26 to 35 years. This indicates a group of people who are yet to adjust in matrimony and are well aware of their rights. The group of people below this age group shows that the persons are too young and do not have a strong feeling regarding their rights. Persons above this age group are either well settled in marriage and in life and apart from some very grave reasons, cannot be provoked into filing divorce suits, no matter what sacrifice they have to make to keep the marriage going. It is the youthful age filled with spirit that comes to the courts of law with a divorce suit. It is the best time to seek a change of life. While they are young, strong and confident of facing an uncertain future. This data is also closely related to the fact that 10 divorces have taken place after 8 years of marriage, 8 divorces in marriages less than a year old, 4 cases between 1 and 2 years of marriage, 6 cases each in marriages 2 to 3 years old and 3 to 4 years old, 5 cases for marriages 4 to 5 years old, 3 cases in 5 to 6 years old marriages, 1 in a marriage between 6 to 7 years old and 2 cases in marriages 7 to 8 years old. This shows that the question of divorce arises either when the parties are unable to adjust with each other in marriages less than a year old or when they are well settled and have deep seated differences in life.

Regarding cases under various grounds of divorce there are 22 cases of adultery, 20 cases of cruelty, 7 cases of desertion, 1 case of impotence, 3 cases of insanity, one case of leprosy, one case of venereal disease, four cases of mutual consent, one case of dowry (may be included under the head cruelty) and 3 cases of irretrievable breakdown, which reiterates the fact that that the grounds of adultery, cruelty and desertion are really the vulnerable points of divorce under Hindu Law which may be abused and subverted by both men and women alike.

Another analysis relating to the income of persons involved in divorce suits makes an interesting study (*see table below*).

No. of cases	Rs 0 - 500	Rs 501 - 1000	Rs 1001 - 1500	Rs 1501 - 2000	Rs 2001 - 2500	Rs 2501 - 3000	Rs 3001 - 3500
36	15	6	8	2	3	1	1

There are 15 divorce cases in the income group of Rs 0 to 500, 6 cases in the income group of Rs 501 to Rs 1000, 8 cases in the group of Rs 1001 to Rs 1500, 2 cases under Rs 1501 to 2000, 3 cases each in the income groups of Rs 2001 to 2500, Rs 2501 to 3000 and Rs 3001 and Rs 3500. This shows that the economic background has direct relationship with divorce cases. Maximum number of divorce cases are filed from the lower income

group between Rs 0 to 1000. When money is the bone of contention, quarrels, misunderstandings, etc., are easy to catch on. Where there is a flow of money with lesser hard work involved, family peace is relatively easy to maintain. Thus, when most of the day is spent in quest of money, there is very little time or scope for family harmony, and interestingly enough the maximum number of adultery cases are filed in the income group of Rs 0 to 1000, namely 8.

Men and women after a hard and grueling day's work tend to avoid their spouses and seek relaxation elsewhere with other women or men. This appears to be a very natural phenomenon. If they spend free time with their respective spouses then the question of family commitment and child rearing cannot be avoided, which will further weigh them down, so adultery is an escape route from the skull drudgery of a monotonous life.

A further analysis of the cases indicates that men form a greater number of adulterers than women and the age group they belong to is 26 years to 35 years. Women are a homing species as a rule. Rearing of the young ones and management of household affairs are her natural instincts. Preoccupation in these matters serves as a check on her adulterous inclinations which is not present in case of men.

Education and Divorce

Of the 46 persons interviewed, 12 are illiterate, 12 have studied between class 1 and 9, three have completed secondary education i.e. class 10 and 2 have studied till class 11, 5 have completed their higher secondary education i.e. class 12, 1 had studied up to graduation, 3 have completed graduation in pass class, 4 were honours graduates and there are 4 persons with post graduate university education. Therefore, the largest number of divorces can be seen among the people who are either illiterate or have studied below class 10. The result if read together with the fact that most of such cases are merely de facto divorce arrangements are indicative of 2 things — first, that most of these persons are really not aware of their rights and second that most of the cases are in the income group between Rs 0 to 1000. De facto divorce is preferred in order to avoid the expenditure of litigation, alimony and maintenance and as most of these cases are cases of adultery, it shows that there is a vicious cycle that needs to be broken. Illiteracy or lack of school education can only lead to unemployment and low income. People belonging to this income group resort to adultery as a diversion from monotony and that leads to estrangement between the spouses leading to de facto divorce. This also explains how the economic and educational background are directly related to the question of divorce.

Remarriage

The rate of remarriage is high among women, i.e. 70 per cent of women remarry after divorce. This is further explained by the fact that of the 46 divorced persons interviewed, 29 were with children and 17 without. Of the 29 persons who were divorced and had children, in 20 cases the mothers were the custodians, in 7 cases the fathers were the custodians and in 2 cases the child was institutionalised with visiting rights to both the parents. Which means the women who are the custodians of the children in most cases and belong to the lower income strata have no option but to remarry for the sake of surviving, even if remarriage means inviting a fresh set of miseries and difficulties. Perhaps it will be in order to mention here that in most of the cases, maintenance was not claimed by the women. Where they did claim maintenance the claim was allowed, the maximum amount of alimony allowed being Rs 27,000 and the maximum amount of maintenance allowed for one person being Rs 400. This being the case, it is easy to understand why 70 per cent of divorced women opt for remarriage.

In spite of laws relating to divorce the fundamental problem remain rooted in socio-economic and educational factors and unless some changes are brought to that situation no amount of legislations will ever aid woman. Additionally, one must not overlook the fact that divorce affects the woman and the child the most. The divorced woman is perpetually dependent on the welfare doles of her husband, namely maintenance or has to remarry simply in order to survive. Stripped of educational facilities and economic support a legislative right is hardly a consolation to the woman. If at all anything must be done for the woman it has to go deeper than a few rights on paper. The legislature and the judiciary have adorned the Hindu woman with matrimonial rights equal to that of man. But Hindu society should be able to swim along with the current of the time and enable women to exercise their legal rights. An integrated approach to the system, and the concept of divorce is a must.

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Shehnaaz Sheikh

Divorce Under Muslim Law

IT IS A MATTER OF COMMON KNOWLEDGE that different religious communities are governed by different Personal Laws. Thus Hindus, Muslims, Christians and Parsis are governed by different marriage and divorce laws. Some of these laws are codified, some uncodified. Muslim Law is basically uncodified.

In order to fully appreciate the concept of divorce in Muslim Law and the legal consequences that flow from it, it is necessary to understand that marriage in Muslim Law is considered a contractual relationship. Monogamy for men is not the rule of law and a Muslim man may marry four wives. The parties to the marriage can stipulate the terms and conditions of the marriage in a *nikaahnama*.

Thus, for example, it is theoretically considered possible to stipulate in a *nikaahnama* that the husband will not take a second wife, that a certain amount of money will be payable as prompt and deferred *Mehr*, that the husband will not bring another woman into the matrimonial home, or for that matter, make any other stipulation for maintenance during the subsistence of the marriage.

In practice however, such *nikaahnamas* are very one sided and rarely does a woman know the contents of the *nikaahnama*, much less is she aware that she is entitled to stipulate any conditions. Moreover, if a Muslim woman asks for a divorce, she is liable to compensate the husband and this compensation takes the form of forfeiting the *Mehr*. Thus the right of a Muslim woman to get a divorce often ends up being illusory.

According to some authors, the marriage of a Muslim woman does not effect a transference of the woman from her parental family to her husband's family. This theory has been used to justify the denial of maintenance to Muslim women after a divorce.

Theories of divorce in Muslim Law are based to some extent on the concept of marriage.

True Islamic Law stood for the breakdown theory of divorce. The Quran did not specify any matrimonial offence; the Prophet laid down no "bar" to matrimonial relief. The modern breakdown theory of divorce does not want the court to go into the causes of the breakdown of marriages; the law giver of Islam did not want the matter to be taken to court at all, unless it became unavoidable. Divorce was declared to be the "worst of all permitted things". And where divorce was unavoidable, he wanted the aggrieved party or both jointly to act quietly and privately; only for exceptional cases did he think of judicial intervention. Thus, from the very beginning Islam recognised (simultaneously) judicial as well as extra-judicial divorce. In the course of time both these came to have various forms, most of which have survived till this day.

For the purpose of having recourse to extra-judicial divorce, rules of guidance based on worldly wisdom and calculated to be helpful in the avoidance of divorce were addressed to men and women. These rules of guidance were not meant to be treated as principles of law, which they, unfortunately, did become in the course of time.

Down the ages, Muslim Law got distorted and complicated. Unfortunately, this is the judicially recognised law in many non-Arab countries, including India.

Marriage contract under Muslim Law may be dissolved in any of the following four ways:

1. By the husband, without the intervention of the courts (*talaq*);

2. By mutual consent, without the intervention of the court (*khula* and *mubara'at*);

3. By a judicial decree, at the suit of husband or wife;

4. By the wife, provided such as stipulation is made in the marriage contract (*tafwiz-i-talaq*);

In addition, the Shafei Law lays down certain grounds on which a wife may divorce her husband [*Mohammed Kannu v/s. Kasim Beevi*, 54 AIR 1954 Trav Coch 219].

I. *Talaq*

A Muslim husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the court. It is not necessary to provide for such a power in the marriage contract; the husband derives it from the law itself. This power is known as the power

to pronounce *talaq*. Any Muslim of sound mind who has attained puberty may divorce his wife at his whim and fancy without assigning a reason [*Ahmed Kasim v/s. Khatun Bibi* (1932) 59 Cal 833, 141 IC 689, (33)]

Ways of Effecting *Talaq*

1. *Oral talaq* — No particular form of words is prescribed for effecting a *talaq*. If the words are express (*saheeh*) or well understood as implying a divorce no proof of intention is required. If the words are ambiguous (*kinayat*) the intention must be proved. It is not necessary that the *talaq* should be pronounced in the presence of the wife or even addressed to her. In *Furzund Hussein v/s. Janu Bibee* [(1878) 4 Cal 588], the husband merely pronounced the word *talaq* before a family council and this was held to be invalid as the wife was not named. In *Asha Bibi v/s. Kadir Ibrahim* [(1909) 33 Mad 22] the Madras High Court held that the words should refer to the wife. In Shia Law a divorce must be pronounced orally in the presence of at least two competent witnesses. Here, a *talaq* communicated in writing is not valid unless the husband is incapable of pronouncing it orally.

If a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her. This is known as *halala*.

Ila — is a form of divorce effected by abstinence from sexual intercourse for a period of not less than four months pursuant to such a vow. According to Shafei Law, the fulfillment of such a vow does not *per se* operate as a divorce, but gives the wife the right to demand a judicial divorce.

Zihar — is a form of inchoate divorce. If the husband compares his wife to his mother or any other female, within prohibited degrees, the wife has a right to refuse herself to him until he has performed penance. In default of expiation by penance the wife has the right to apply for a judicial divorce. The law of *zihar* has now received statutory recognition in S. 2 of the Shariat Act, 1937.

2. *Talaq in Writing* — A *talaqnama* may be only the record of the fact of an oral *talaq* or it may be the deed by which the divorce is effected. The deed may be executed in the presence of the qazi or the wife's father or other witnesses. The deed is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed. If it is not so superscribed and addressed, it is said to be in unusual form. Regarding the nature and effects of a *talaqnama*, the courts have held: (a) for the purpose of the dissolution of the marriage, a *talaqnama* is effective from the date on which it is written, not from the date of its delivery to the wife (unless the *talaqnama* itself states to the contrary)

(b) if the husband writes a letter of *talaq* and sends it to the wife, the letter will operate as *talaqnama* regardless of her refusal to take it [*Ahmed Kasim v/s. Khatun Bibi*] (c) Where a *talaqnama* says that *talaq* will take place when it is delivered to the wife, delivery will be presumed if she avoids it or if delivery is made to the person (e.g. her father) who usually deals with her affairs (d) a *talaqnama* written in the presence of a qazi or the wife's father or some other witness is a proper *talaqnama* [*Waj Bebee v/s. Azmat* (1868) 8 WR 23]

Registration of *talaq* whether in writing or oral, is not necessary anywhere in India. Under Hanafi Law *talaq* is valid whether oral or in writing [*Sattar Shaikh v/s. Mst Sahdunnisa* 1969 ALJ 415] whereas in Shia Law *talaq* communicated in writing is not valid unless the husband is incapable of pronouncing it orally.

Different Modes of *Talaq*

Sunnis recognise two kinds of *talaq*, namely a) *talaq-us-sunnat*, i.e. *talaq* according to the rules laid down in the *Sunnat* (traditions) of the Prophet b) *talaq-ul-biddat* i.e. *talaq* in one sitting.

a) *Talaq-us-sunnat* is of two kinds namely *talaq ahsan* and *talaq hasan*. (i) *Talaq ahsan* consists of a single pronouncement of divorce made during the *tuhr* (period between menstruation) followed by abstinence from sexual intercourse for the period of *iddat* (see below) (ii) *Talaq hasan* consists of three pronouncements made during successive *tuhrs*, no intercourse taking place during any of the three *tuhrs*.

b) *Talaq-ul-biddat* is the most common and prevalent mode of divorce in India. Its essential feature is immediate irrevocability on pronouncement. *Talaq-ul-biddat* consists of (i) three pronouncements made during a single *tuhr* either in one sentence, e.g. "I divorce thee thrice" or in separate sentences, e.g. "I divorce thee, I divorce thee, I divorce thee" (ii) a single pronouncement during a *tuhr* clearly indicating an intention to irrevocably dissolve the marriage, "I divorce thee irrevocably".

In *Sheikh Fazhur v/s. Musammat Aisha* [(1929) 8 Pat 690, 115 pg.546, (29) AP 81] the High Court of Patna has expressed the opinion relying on a passage on page 74 of the Hedaya, that a *talaq-ul-biddat* effected by a "triple pronouncement" is valid even if it is a pronouncement when the wife is in her menstruation. Shia lawyers do not recognise the validity of *talaq-ul-biddat*.

Revocability

In Muslim Law an extra-judicial divorce may be either revocable (*raji*) or irrevocable (*bain*). Revocability is closely linked with the concept of

iddat. Wherever a divorce is revocable, revocation is possible only until the expiry of a particular period, called *iddat* during which the woman is not allowed by law to marry again. *Iddat* of divorce means: (a) for a pregnant woman, the duration of pregnancy (b) for a non-pregnant menstruating woman, three menstrual periods in Hanafi Law and 3 non-menstrual periods (*tuhrs*) in Ithna Ashari Law and (c) for a non-pregnant, non-pregnant, non-menstruating woman, 3 lunar months in Hanafi Laws and 78 days in Ithna Ashari Law.

A *talaq* in the *ahsan* mode becomes irrevocable and complete on the expiry of the period of *iddat* (b) A *talaq* in the *hasan* mode becomes irrevocable and complete on the third pronouncement irrespective of the *iddat*. (c) A *talaq in the biddat* mode becomes immediately irrevocable on pronouncement, irrespective of *iddat* and hence it is called *talaq-i-bain* (irrevocable *talaq*). Until a *talaq* becomes irrevocable the husband has the option to revoke it. This may be done either expressly or is implied by conduct as by resuming sexual intercourse. A paper divorce in writing operates as an irrevocable divorce (*talaq-i-bain*) and takes effect immediately on its execution.

In *Saleha Bi v/s. Sheikh Gulla* [(72) AMP 207] the husband in an application to the qazi said that he had divorced his wife by *talaq-ul-bain* and the qazi recorded his statement. This amounts to irrevocable divorce and the wife cannot inherit. A plea of divorce in the written pleadings amounts to a valid divorce at least with effect from the date of the statement. [*Syed Jamaluddin v/s. Valian Bibi* (1975) 2 APLJ 20].

II. *Khula* and *Mubara'at*

A divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie is known as *khula*. In such a case, the terms of the bargain are matters of arrangement between the husband and the wife, and his wife may, as the consideration, forfeit her *Mehr* (dower) and other rights or make any other agreement for the benefit of the husband. Failure on the part of the wife to pay the consideration for divorce does not invalidate the divorce, through the husband may sue his wife for it. Once the offer by the wife is accepted, it operates as a single irrevocable divorce (*talaq-i-bain*).

Mubara'at — is a mutual desire for separation by both husband and wife. The offer in *mubara'at* may precede from the wife or it may precede from the husband, but once it is accepted the dissolution is complete, and it operates as a *talaq-i-bain*.

In both *khula* and *mubara'at*, the wife is bound to observe *iddat* and the husband is liable to maintain her during the *iddat* period. Both *khula* and

mubara'at are mentioned in the Shariat Act of 1937 and have statutory recognition in India. They may be effected by the parties themselves or by a qazi without the intervention of the court. The function of the qazi (if he is approached) will however be merely declaratory dissolution of the marriage which will result from the spouses agreement itself. Under Hanafi Law, the presence of witnesses is not insisted upon but under Ithna Ashari Law, the presence of at least two witnesses is necessary. *Mubara'at or khula* may be effected orally or in writing. Generally, the agreement is reduced to writing and is called *khulanama iwaz* (return) which is a substitute of *Mehr*. It may or may not be specified in the *khulanama* or agreement of *mubara'at*. Whatever constitutes *Mehr* in the *nikah* can also form *iwaz*. If the *Mehr* has already been paid, the wife may agree to make a specified payment to the husband towards *iwaz*.

A completed agreement of divorce, whether *khula or mubara'at* leads to an irrevocable divorce under Hanafi and Ismaili Laws. In Ithna Ashari Law the resulting divorce remains revocable, at the option of the wife during her *iddat*, thereafter it becomes irrevocable.

III. Judicial Divorce

In Islamic legal theory, judicial divorce is called *faskh*. In the Indian sub-continent, this type of divorce was introduced in 1939 by the Dissolution of Muslim Marriages Act. This Act is primarily based on the Maliki school of Muslim Law. This Act applies to all Muslims irrespective of which school of law they belong to. The provisions of the law are meant for all, there being nothing in them protecting the inter-school differences. Under the Act, a Muslim wife can obtain a decree for *faskh*. There is nothing in this Act enabling a husband to apply for a decree of *faskh*.

This Act specifies eight independent grounds on which the court can dissolve a marriage by *faskh* at the instance of the wife. These are:

1. *Missing husband*: Where a husband's whereabouts are not known for a period of four years or more, the wife can apply for *faskh*.

a) When a wife seeks *faskh* on this ground, the court shall give notice of her suit to all heirs of the husband (as on the date of the suit) and to his brothers and paternal uncles (whether heirs or not). Each of these persons will have a right to be heard. b) If the court passes a decree of *faskh*, it will remain in abeyance for six months. During this period if the husband comes back and the court is satisfied of his willingness to perform his conjugal duties, the decree shall be set aside.

2. *Want of maintenance*: Where the husband fails or neglects to provide maintenance to the wife for a period of two years or more, she can apply for *faskh*.

In Shafei Law inability of the husband as well as his 'failure' or 'neglect' to maintain the wife are good grounds for *faskh* [*Kunju Ismail v/s. Khadija Umma*, AIR 1959 Ker 151]. The question whether a Muslim wife can seek *faskh* on the ground of want of maintenance is independent of her right to seek maintenance under Ss. 125-128 of the Criminal Procedure Code.

3. *Imprisonment*: If the husband has been sentenced to imprisonment for a period of seven years or more, the wife can apply for *faskh*.

4. *Non-performance of marital obligations*: If for three years or more the husband has failed to perform his 'marital obligations' the wife can apply for *faskh*. a) A suit for *faskh* will be under this provision if the husband has deserted the wife for three years though he has been providing maintenance to her. b) Where desertion for three years is coupled with non-payment of maintenance a suit may lie jointly under clauses (ii) & (iv) of S. 2.

5. *Impotence*: a) The wife can sue for *faskh* on the ground of her husband's impotency if she can prove: (i) that he was impotent at the time of marriage and (ii) that he has since then been impotent up to the time of filing the suit. b) The husband may (if he so desires) ask for time to prove that "he has ceased to be impotent". On that the court has to give him one years time for this purpose. In *Abdul Azim v/s. Fahimunnissa* [AIR (1969) Mys 226] the Mysore High Court has held that the wife shall not be compelled to submit herself to the husband in order to test the truth of his claim that he has ceased to be impotent.

6 *Mental or bodily disease*: If the husband has been suffering from insanity (for two years or more) and/or leprosy or a virulent venereal disease (irrespective of the duration) the wife can sue for *faskh*.

7. *Option of puberty*: Under this provision a wife who was given in marriage by her father or guardian before she attained the age of 15 years can seek a decree of *faskh* on the ground that she has repudiated the marriage which remained unconsummated, before completing 18 years of age.

8. *Cruelty*: If the husband treats the wife with cruelty she can sue for *faskh*. Cruelty is defined as follows: a) habitual assault in making the wife's life miserable by physical ill-treatment or by a conduct short of that; b) association with women of evil repute or otherwise leading an infamous life; c) attempt to force the wife to lead an immoral life; d) disposing of her property or preventing her from exercising her rights therein; e) obstructing her in the observance of her religious profession or practice; f) inequitable treatment by a polygamous husband, contrary to what the Quran lays down

in this behalf. In *Zubaida Begum v/s. Sardar* [AIR (1943) Lah 310] a Division Bench of the Lahore High Court held that if any of the wives was not provided with maintenance within the meaning of S. 2(ii) of the Act, unequal treatment would be established.

Besides the 8 grounds mentioned above the court is also empowered to dissolve a marriage on any ground which is recognised as valid for the dissolution of marriages under Muslim Law. This shows that the list of grounds for *faskh* specified in the Act is merely illustrative. The main purpose of the Act, is to confer on the Civil Courts of India, the general power of the qazi in respect of *faskh* as recognised in Muslim Law.

The Act contains a clause which says: "Nothing contained in this Act shall affect any right which a married woman may have under Muslim Law to her dower or any part thereof on the dissolution of her marriage."

Applications of classical law: The Shafei and Ithna Ashari Laws (unlike Hanafi Law) allow a wife to annul her marriage by her unilateral action and without the intervention of the court on the following grounds: a) insanity of husband b) non-consummation of marriage on account of husband's impotency c) his inability to maintain his wife. Where a Shafei or Ithna Ashari wife annuls her marriage on any such ground but the husband refuses to recognise the validity or the effect of her action, she may obtain from the qazi a declaration that her marriage stands dissolved.

A marriage solemnised or registered under the Special Marriage Act, 1954 (whether either or both parties are Muslim) is wholly exempted from the Muslim Law of divorce, statutory as well as non-statutory. Such a marriage can be dissolved only under that Act.

IV. *Tafwiz-i-Talaq*

In both Sunni and Shia Law, the husband may either in the contract of marriage, or by agreement after marriage, delegate to his wife or any other person absolutely or conditionally his power to divorce. This power is known as *tafwiz-i-talaq* or the delegation of the power to divorce. The power so delegated to the wife is not revocable and she may exercise it even after the institution of a suit against her for restitution of conjugal rights [*Hamindoola v/s. Faizunnissia* (1882) 8 Cal 327].

Muslim jurists have divided the delegation of the power to divorce by the husband into three categories. These three categories differ from one another as follows:

In *tafwiz* the wife is delegated the power to herself divorce if she so desires. Hence, the right of opinion to use this power or not lies with her. In *tawkil*, the husband appoints an agent to repudiate his wife on his behalf.

The agent can exercise the power delegated to him in respect of another that is the wife. He has no authority to continue the marriage as such power has not been given to him, but can only, repudiate the wife. In *risalah* the husband appoints a person his messenger, to convey the message to the wife that he has delegated the power to his wife.

Conclusion

Thus we see that the Muslim Law of divorce as is interpreted and implemented in India today is heavily biased in favour of the man. If at all women are to get a better deal the horrendous form of unilateral *talaq* will have to be reformed.

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Sanober Keshwaar

The Triple *Talaq* — Unjust, Untenable, Un-Islamic

(In May 1993, a body of Muslim theologians issued a fatwa in a case referred to them invalidating the triple talaq *given at one sitting, whereby a Muslim husband could unilaterally divorce his wife without witnesses and without assigning any reasons. This was welcomed by a group of Muslim women who held a press conference in Delhi in late June 1993 where they announced a "jihad" against the triple talaq and declared their resolve to urge the All India Muslim Personal Law Board to declare the triple talaq as anti-Islamic. Within a week of this event, the Jamaat Ulema-e-Hind, a central body of Sunni theologians, published a statement upholding the validity of the triple talaq. The controversy has continued to blaze not only within the Muslim community but also without. For the anti-Muslim Hindu fundamentalist lobby, this is another opportunity to highlight the "backwardness" of the Muslim community and the "injustice" it metes out to its women, and to insist that this can be remedied by the imposition of a Uniform Civil Code. Here we present the views of the progressive sections of the Muslim community who argue that democratic rights for Muslim women are possible within the framework of Islam and why this process has been subverted and by whom).*

THE FATWA OF THE JAMAAT AHL-E-HADEES on the triple *talaq* raises questions of far reaching national importance, particularly for the women of this country. The fatwa seems to represent the aspirations of a large number of Muslim women and is in consonance with their perceptions of their own identity both as women and believers in Islam. Ever since the Shah Bano controversy in 1986, Muslim women have always believed that the Indian state has acted in an un-Islamic manner in enacting the Muslim Women's (Protection of Rights on Divorce) Act, 1986. Several scholars have

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contended that this Act actually goes against the basic tenets of Islam. Muslim women have argued that not only is the intervention of the Indian State un-Islamic but that it is also anti-women. Many of them do not perceive a false conflict between their identity as women and their identity as believers in Islam. It is for this reason that the recent fatwa of Jamaat Ahl-e-Hadees has evoked such a great interest amongst the women of the Muslim community. They believe that the fatwa gives voice to their aspirations for a just social and legal order. As the interviews and stories below demonstrate, the practice of triple *talaq* does not have the sanction of the Quran. In fact, in Islamic jurisprudence, it is known as *talaqul bidaat* or heretical divorce. The Prophet approved of only two kinds of *talaq* — the *talaq hasan* or the good divorce and the *talaq ahsan* or the best divorce. *Talaq hasan* consists of three pronouncements of divorce made during *tuhr* (the intervening periods between two menstruations), during which no sexual intercourse is to take place; in case it does, the divorce becomes ineffective. *Talaq ahsan* consists of one pronouncement of divorce which becomes effective only after the *iddat* period is over (*iddat* is generally calculated as four months and ten days).

In so far as Personal Law is concerned, large sections of this country are governed by their own separate codes of law. This law may be either codified or uncodified. Thus in matters relating to marriage, divorce, succession, adoption, custody of children, maintenance, different religious communities are governed by their respective laws. The Personal Law of the Muslims derives its sources from the Quran.

While welcoming the fatwa, Muslim women argue that it basically finds its sustenance in the Quran and lays down a principle for the dissolution of marriage, which at least ensures to women some measure of equity and fairness. The triple *talaq* is not legally sanctioned. In the overwhelming majority of the Islamic countries, Mulana Mukhtar Ahmed Nadvi points out, the practice of triple *talaq* has been banned, i.e. in Iran, Iraq, Turkey, Saudi Arabia, Kuwait, Egypt. The politics of religious fundamentalism and the need to canvass for votes on a communal basis have ensured that Indian Muslims allow women's rights to remain uncodified. As a result, the implementation of Muslim Personal Law remains the exclusive domain of the Ulemas. This has resulted in a situation in which Muslim women are totally dependent on the male dominated religious hierarchy for the enforcement of their rights.

We are currently witnessing a phenomenon parallel to Rajiv Gandhi's intervention in 1986. At that time, the Indian State's intervention succumbed to pressure from reactionary fundamentalists within the Muslim community. While then the Muslim fundamentalists demanded the annul-

Text of the Fatwa of Ahl-e-Hadees

Q. What do Allah and his Prophet say in this matter where a quarrel cropped up between me (Mr Dilshad Ahmed) and my sister-in-law which took a serious turn. My sister-in-law challenged me saying, "If you are a true son of your father, then divorce my sister Bilqees (my wife)." Thus, in a fit of anger, I divorced my wife (Bilqees) declaring, "I have divorced you, I have divorced you, I have divorced you." Nearly ten days have passed now and the squabble between my sister-in-law and me has been hushed up and my wife (already divorced) has agreed to return to me. Could I now revert to her? People say she cannot come back to me without undergoing "halalah" (marriage of the divorced woman with another man resulting again in divorce, making the re-marriage lawful to the first husband). You are requested to give your decree based on the evidences of the Quran and Hadees.

A. In the aforesaid situation, the triple *talaq* given by Dilshad to Bilqees in one sitting or in the non-menstrual period will be considered as only one *talaq*, i.e. *Talaq-e-Rajai* (revertible separation), in the light of Quran and Hadees, and the remaining two *talaq*s will be considered null and void and will be construed as a mockery of the Shariat (Islamic Laws). Therefore, it is perfectly right for Dilshad to have recourse to his wife Bilqees and can live together throughout life as husband and wife hereafter.

In this context, there is evidence from Hazrat Rukana who quotes that Hazrat Rukana s/o Abd s/o Yazeed uttered triple *talaq* (in one sitting) to his wife and then referred the case to the Prophet by swearing in the name of Allah that he had intention to give only the first *talaq*. The Prophet thereupon specifically got it confirmed from Rukana on oath on Allah whether he (Rukana) had intended to give only the first *talaq*. And when Hazrat Rukana replied in the affirmative, the Prophet ordered his (Rukana's) wife to go back to her husband. (Ref. Tirmizi, Abu Dawood, Ahmed, Darmi, Ibne Maja). Moreover, the case of Dilshad is quite contrary to what has been stated in the Holy Quran (Ref. Sura At-Talaq), as it does not fulfill the conditions as laid down in the Holy Quran. On the contrary, it is sort of a mockery of the Holy Quran and the Hadees which make it incumbent on every Muslim that he should refrain from such an act. Moreover, the Prophet has manifested his anger on such an act (Ref. Nasai).

Hazrat Mahmood s/o Lubaid quotes, "Once the Prophet was informed of a person who had given triple *talaq* in one sitting." On hearing this the Prophet got up in a fit of anger, saying, "Do the people make fun with Allah's book, (i.e. Quran), when I am still alive." A man (from the audience) got up and asked the Prophet, "Should I not kill him (the man who gave triple *talaq* in one sitting)?"

(From the foregoing) it is concluded that whether it be in the way of worship or the day to day affairs of one's life the obedience of the Shariat will be valid only to those acts of men that are executed as per the precepts of the Quran and the Hadees. Thus, according to what has been explained hereinabove, Dilshad has full right to take back Bilqees as his wife without any hesitation.

ment of the Shah Bano case, today the Hindu fundamentalists are demanding a Common Civil Code as an attack on the identity of the Muslims. This only proves the point that the Indian State consistently intervenes on behalf of religious fundamentalists of one or the other variety. The women's movement, knowing that they must steer clear of such intervention, have fallen into the trap of demanding a Common Civil Code at this point of time in history.

A first step in the direction of ensuring justice to Muslim women would be the codification of Muslim Personal Law together with setting up of courts through which these laws can be enforced. Even if we have to accept a plurality of legal systems, the least that can be expected is that there be a certainty about the legal codes that govern the individuals for whom they are made. Marriage, divorce and custody are all matters of civil status and can hardly be left for decision to the subjective interpretation of individuals enforcing these codes. All civil laws in India draw their sustenance from religious codes whether they be Muslim, Christian, Hindu or Parsi. Women who demand a Common Civil Code must be able to articulate the principles on the basis of which they seek a Common Civil Code. Are there universal principles which will ensure a just and egalitarian basis for the marriage relationship? If so, what are these universal principles? There is a heavy responsibility on the women's movement to discuss and articulate such principles which will govern the relationship between husbands and wives, parents and children. A Common Civil Code must address the question of consequences of the marital relationship and consequences of its breakdown. While people belonging to different religious communities would be free to marry according to the customs of their community, once the marriage has been entered into, the mutual rights and obligations of the parties to the marriage would be determined on a just and fair basis. Similarly, on the breakdown of the marriage, the respective rights and responsibilities of the two parties to the marriage, not only towards each other but also towards their children, would have to be determined on a basis which is fair to women.

The persons whose opinions are reflected in the interviews that follow have expressed their intent of what they consider just and fair. We need to listen to these voices as they make an important contribution to the debate for a just and fair law on marriage and divorce. The debate will enrich our thinking of new laws for women.

"In the Hadees, it is written that such men (who resort to the triple talaq) should be severely punished..."

Maulana Mukhtar Ahmed Nadvi is the President of the Jamat Ahl-e-Hadees which body gave the historic fatwa holding a triple talaq given at one sitting to be invalid. He is also the Vice-President of the Muslim Personal Law Board and the All India Milli Council.

Q. What exactly is the Jamat-Ahl-e-Hadees?

A. It is a body of intellectuals and theologians from the Muslim community who meet periodically to seek solutions to theological questions and questions of our Personal Law in the light of what is written in the Quran and the Hadees (the practice and teachings of Prophet Mohammed). We do not belong to any of the schools of Muslim Law. Our Jamat is rooted in ancient times. We accept Abraham as our first prophet and Mohammed as the last prophet of Allah, and the Quran is the last and most perfect book of Allah's word.

After Prophet Mohammed's death there came many learned men and philosophers who offered their own interpretations of the Quran. Though we respect all these wise men, we do not accept their interpretations. We interpret the law every Muslim must follow in the light of what is written in the Quran and the Hadees. In fact our motto is: "*Hamare liye Quran aur Hadis kafi hai.*"

Q. The Jamat Ulema-e-Hind has held the triple talaq to be valid. Which ruling is correct?

A. That which is in line with what is written in the Quran. The prophet has said that with Allah, the most detestable of all things permitted is *talaq.*

You must consider this in the light of the status of women in Islam. Islam has given the maximum respect and love to women. The Quran says that the world is a garden and its most precious flower is a chaste woman (Sharif aurat). It is said that the best man is he who is good and just to his wife. Women have been given great justice in Islam. The man who marries a widow is sure to attain paradise, says the Quran. A man who, having only daughters, cares for them without regretting that he had no son and brings them up well, will also attain paradise. In Islam, a woman inherits in six different capacities: as a daughter, wife, mother, sister, grandmother and grandmother-in-law.

A man is exhorted to love his wife, not harass her. Moreover, he must

provide for her adequately, she should not have to earn her livelihood. If a man cannot maintain his wife in comfortable circumstances, he should not marry. If a man takes more than one wife, he must treat them equally in all respects.

Q. Yet, but then why is the man given this right of unilateral divorce?

A. Islam says that all acts and behaviour of the wife should be condoned by the husband, except one — adultery. An adulterous wife can be thrown out of the house. But all acts short of adultery are to be tolerated. But if a husband feels that he just cannot pull on with his wife, he has no right to just fire off three *talaq*s and end the marriage like that. He must first intimate his own family and his wife and her family of his intention to give *talaq*. Then one representative each from both their families will sit and try to reconcile the couple and sort out the problems. This is written in Sura (chapter) IV.35 of the Quran. When such attempts at reconciliation fail, then only can the man give *talaq*. That too, it must be three *talaq*s spread over three successive *tuhrs* (period between menstruations), with no intercourse taking place during any of the *tuhrs*. This 90 days' period is stipulated so that the man has enough time to reconsider his decision, and the couple has time to sort things out.

Q. But what of those husbands who do not follow this procedure but give the triple talaq at one sitting?

A. In the Hadees, it is written that such men should be severely punished. In the Prophet's time, the husbands who resorted to this triple *talaq* at one sitting were slashed with swords as a punishment, and their "divorced" wives were sent back to their errant husband's homes.

Q. If the prophet took such a severe stand against the triple talaq at one sitting, why is it still being upheld as valid by the Muslim Schools of Law?

A. After Prophet Mohammed died, his successors who assumed the leadership of Islam were known as the Khalifs. First there was Abu Bakr and then, after his death, came the Khalif Omar. Omar undertook the conquest of Syria, Egypt and Persia. In the course of these conquests, Arab men had easy access to many female slaves. The strict rules of *talaq* became relaxed as men married and divorced their wives many times over. The Khalif Omar wanted to stop this evil practice so he issued an ordinance whereby the triple *talaq* given at one sitting became operative as a final *talaq*. Omar wanted his ordinance to be punitive one. Succeeding theologians followed this Ordinance and hence the triple *talaq* is considered to be valid by some. But this is not the correct position. Islamic countries like Turkey, Kuwait and Saudi Arabia, have banned this form of *talaq*.

Q. Then why is it still practised in India?

A. We are trying our best to reform the law. We cannot accept practices like the triple *talaq* which contravene the Quran. We are going to take up this issue with the Muslim Personal Law Board and settle it. We are in the process of educating our people about their rights. Unfortunately, ours is still a largely backward community. Education is the answer to many of our problems.

"Muslim women are like a minority within a minority"

***Shehnaz Sheikh**, herself a victim of the triple talaq, now runs a women's organisation called Aawaaz-e-Niswaan (Voice of Women) in Bombay which fights for Muslim women's rights.*

Lawyers Collective: Do you think the fatwa of the Ahl-e-Hadees will help Muslim women?

SS. It's definitely a step ahead. In my experience, the triple *talaq* given at one sitting is the most common form of *talaq* used here. In fact, India is the only place in the whole world where this form of *talaq* is still used. And even if this form is not used, its validity continues to be a real threat — it's like the proverbial sword hanging over a Muslim wife's head.

The triple *talaq* is considered valid according to the four main schools of Muslim Law. It can be given orally and without witnesses. If this is done, the concerned woman's marital status remains ambiguous — because it's his word against hers. My husband divorced me by uttering *talaq* thrice at one go. I remember I had asked him at that time to give it to me in writing. He had refused to do so, saying that the qazis he had consulted said an oral *talaq* was valid. So I was left with no proof of my divorce. If in case I had got married again, my former husband could very well have charged me with bigamy.

LC. What do you see as the way out of this state?

SS. For a start, Muslim Personal Law should be codified. Each of the four main schools have their own tenets, but Islam allows consensus or 'ijma' between them.

For example, the Dissolution of Muslim Marriages Act, 1939 is based on the Hanafi School of Law, yet all the other schools of law have accepted it.

Therefore, I feel that tenets of law which uphold the interests of Muslim women must be codified. Within the framework of Islam there is enough

scope to give equal rights to women, but the mullas will not allow this.

Secondly, there should be proper arbitration between the parties before divorce. Today in our country, the only arbiters are the qazis — who not only have a chauvinistic patriarchal attitude but are not well-versed in Islam. Here, they are a para legal authority. In other countries there is a Shariat Court. But in our country no codification or Shariat Courts are possible and there are political reasons for this: the Indian state's so-called "appeasement" of a small section of the Muslims — the fundamentalist leadership which has a vested interest in keeping the community backward.

This is best illustrated by the Shah Bano case. The Supreme Court ruled that a divorced Muslim woman was entitled to maintenance from her former husband under S. 125 of the Cr.P.C. till she remarried. The Mullas promptly branded this an un-Islamic judgement. So Shah Bano's lawyer, a Muslim himself, gave adequate references from the scriptures supporting the judgement. Then the self-appointed leadership of the Muslims protested hat the Supreme Court had no right to interpret our scriptures. These fundanentalists want to maintain their monopoly over interpreting the scripures.

They whipped up the religious sentiments of the Muslim masses by shouing that Islam is in danger. And why did the Muslim masses go with ther? Because of the fear psychosis of being a minority community and the laclof an alternative progressive leadership.

Then, on the other hand, the Hindu fundamentalists used the very same isse to harangue the Muslim community: they supported Shah Bano and deanded a Uniform Civil Code. Thus, what was essentially a question of wmen's rights was made into a major communal issue. And, inevitably, thrights of Muslim women got sidetracked.

But then, the fundamentalist leadership of the Muslims has always setracked the real issues concerning women. For example, whenever it mes to a question of women's rights, the mullas insist that we must go by nat is written in the Islamic scriptures.

Yet when the British rulers scrapped the Muslim criminal law and made ie Cr.P.C., IPC and Indian Evidence Act applicable to all Indians, ncluding Muslims, they accepted it.

So many Muslim women were raped and killed in the recent riots. Did the Mullas give any help then? Did they issue any "fatwa" at that time? These people are basically communal fascists who are dangerous to Muslim women. Now these leaders are seeking to communalise the issue of the triple *talaq* as well. By upholding the validity of the triple *talaq*, the Muslim fundamentalists are giving the Hindutva forces a stick to beat the

Polygamy and Divorce in Pakistan Law

Divorce and polygamy in Pakistan are governed by the Muslim Family Laws Ordinance, 1961. This Ordinance applies to all Muslim citizens of Pakistan irrespective of their caste or sect, i.e. Shias, Sunnis, or Ismailis, and as such the distinction in various sects in the application of their Personal Laws or usages is done away with, at least in the application of this Ordinance.

Polygamy

1. No man during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

2. An application for permission under Sub-section (1) shall be subnitted to the Chairman in the prescribed manner together with prescribed fee and shall state reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

3. On receipt of the application under Sub-section (2), Chairman shall sk the applicant and his existing wife or wives each to nominate a representatie, and the Arbitration Council so constituted may, if satisfied that the proposd marriage is necessary and just, grant, subject to such conditions, if any as my be deemed fit, the permission applied for.

4. In deciding the application the Arbitration Council shall record i reason for the decision and any party may, in the prescribed manner, withi the prescribed period, and on payment of the prescribed fee, prefer a application for revision to the Collector and his decision shall be final anc shall not be called in question in any court.

5. Any man who contracts another marriage without the permission of the Arbitration Council shall:

a) pay immediately the entire amount of the dower whether prompt or deferred due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

Talaq

1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

2) Whoever contravenes the provisions of Sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

3) Save as provided in subsection (5) *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

4) Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

5) If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever is later, ends.

6) Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

Footnote

(a) 'Arbitration Council' means a body consisting of the Chairman and representative of each of the parties to a matter dealt within this Ordinance:

Provided that where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council;

(b) 'Chairman' means the Chairman of the Union Council or a person appointed by the Central or a Provincial Government, or by an officer authorised in that behalf by any such Government, to discharge the functions of Chairman under this Ordinance.

Provided that where the Chairman of the Union Council is non-Muslim or he himself wishes to make an application to the Arbitration Council, or is, owing to illness or any other reason, unable to discharge the functions of Chairman, the Council shall select one of its Muslim members as Chairman for the purposes of this Ordinance.

Muslim community with as it reinforces the Hindutva propaganda that Muslims are backward. Now the Muslim fascists will raise the bogey of Islam in danger and give the call to close our ranks and suppress our male-female differences. But we Muslim women are like a minority within a minority, we have to fight two battles simultaneously — one, against oppression as a minority and two, within our community as women for our rights.

Today, the fundamentalist fascist leaders of the Muslims are living in a fool's paradise if they think that they will be able to whip up the bogey of "Islam in danger". Islam is not in danger. It is the unchallenged power of these leaders which is in danger. No matter what fatwas these people may give, our women will continue to raise their voices against anti-women practices. No one can suppress this. All people will rise against the triple *talaq*.

Talaq and the Tragedy Queen

Bollywood's most famous — and forgotten — triple *talaq* involves actress Meena Kumari and her director husband, the late Kamal Amrohi. Meena Kumari was Amrohi's second wife and the leading tragedy queen of the Indian silver screen. Their marriage, said to be turbulent, ended abruptly when, in a fit of rage, Amrohi pronounced "*talaq*, *talaq*, *talaq*" to a shocked Meena Kumari. She had no option but to leave him and their elegant Pali Hill apartment. Soon however, Amrohi regretted his angry outburst and wanted to recall his divorced wife, Meena.

He was advised by the qazis that unless Meena Kumar contracted another marriage, consummated it and her second husband divorced her voluntarily, he could not remarry her.

Amrohi tried a short cut. He ordered his own secretary, one Baqer, to marry Meena for the purpose of paving the way for his own remarriage. Baqer was only too willing to obey Amrohi's order. Trouble began when Baqer refused to give a triple *talaq* to his famous wife Meena Kumari as planned! Amrohi was at his wits end. Rumour has it that Amrohi was blackmailed into coughing up a large amount of money to get his former wife Meena Kumari free from Baqer!

Amrohi then remarried Meena Kumari. Ironically she left him a few years later, and lived alone till her death in March 1972.

Rinki Bhattacharya

Saru's Struggle

The case of P.K. Saru, reported in *The Lawyers* (November 1987 issue), more than any other highlights the double discrimination of "triple *talaq*" and the new judgement of maintenance (for the 3 months Iddat period) passed after the Shah Bano case.

Saru — the daughter of Justice P. Kunhammed Kutty Haji (first Muslim Judge of the Kerala High Court) is a devout Muslim with a liberal attitude to other communities. Married first through an arranged match at the age of 20, that marriage broke down. Saru and her first husband separated by mutual consent. They had two children. Saru returned to her parental home in 1966. She remarried one P.A. Salim a year later much against her family's wishes. However, her family soon reconciled. Salim was considered a progressive man and was, moreover, highly qualified. He took a job in Jeddah, and the couple saved enough to build a house in Cochin where they intended to settle on return.

On their return from Jeddah, Salim went to meet the principal of their sons' school in Madras. The next thing Saru knew is a four line letter from her husband declaring he had irrevocably divorced her 'due to mental incompatibility'. She remembers being shocked and pained by her husband's unilateral divorce. Saru expressed her shock saying:

"How can a 20 year old marriage be wiped away by a 4 line letter? Salim had never mentioned divorce." Saru thought this system of unilateral divorce was "impertinent" besides being un-Islamic. Her husband could discard her on the strength of the Personal Law and literally threw her out of the house.

Saru requested her husband to assign the house to her so that their two sons would get it after them. He told her it was bought with his hard earned money. Her request to take her ancestral furniture came to naught when Salim asked her to sign a receipt for Rs 50,000 against it! Finally Saru left without her belongings including her jewelry and passport.

Saru filed in court for a "reasonable and fair provision" from her former husband. Saru's appeal was rejected by the District Judge, Calicut.

Meanwhile her husband remarried his cousin sister. And their two sons aged 19 and 16 continued to live with him. Saru moved the higher court in appeal.

Before the judgement was passed, however her husband passed away. What this meant was that Saru would have to fight her two sons — their father's legal heirs — for her right to maintenance. So far, Saru had a cordial relationship with her children. She realised the court matter would

threaten her relationship. So she decided to withdraw her claims. Her sons too withdrew the case.

Though Saru did not gain legally, she was convinced her struggle would eventually benefit other Muslim wives.

As a consequence of Saru's determined legal battle for maintenance beyond the 3 months Iddat period — the Kerala High Court granted a life long maintenance to a divorced Muslim wife. In short "maintenance" is now interpreted to mean "for life" in Kerala. This is indeed a triumph for Saru who has devoted her life to help women and more particularly Muslim wives who share her tragic fate.

Rinki Bhattacharya

(From, *The Lawyers*, July 1993).

15

Danial Latifi

Islamic Law Through The Ages

THE MEDIA ATTENTION to the "fatwa" by some Ahl-e-Hadith Maulanas outlawing the notorious triple *talaq* indicates public interest in the development of Muslim Law. This is a convenient moment to remind ourselves who the Ahl-e-Hadees are and what are the various schools of Muslim Law.

What the Ahl-e-Hadees-Ulema have said is nothing new. It corresponds to chapter 65 of the Quran, that lays down a three month (minimum) procedure for effectuating *talaq*. This is coupled with provisions enjoining arbitration and attempts at reconciliation. The Prophet said that of all things permitted by law the most hateful in the sight of God is divorce. All efforts are to avoid hasty divorce.

This has always been the position of the Shias and the Ahl-e-Hadees who are followers of Imam ibn Hanbal. Needless to say this is a healthy rule and should be encouraged for all. None should object to it except moth-eaten minds.

The Muslim Law as generally administered consists of jurisprudence elaborated by the five main schools of Muslim Law (*vide infra*). Each of these schools claims to be based on the primary sources, namely the Quran and the Hadees.

Sources

The fundamental credo of Islam is: "There is no God but God, and Mohammed is his Prophet."

From this arises the juristic scheme that the Word of God is Supreme. Next after the Word of God come the words (and acts) of the Prophet of God. After that comes jurisprudence created by legitimate human authority. The Word of God is found in the Quran. It is a Book consisting of 114 chapters (Suras). Muslims believe it to contain the *very words* of God Almighty. The Quran is now readily available in translation.

The words and acts of the Prophet are collectively called the Hadith (sometimes referred to as the Sunna). This comprises the corpus of dicta and recorded acts of the Prophet Mohammed which stand next in authority to the Quran. These have not been formalised to the same extent as the Quran. They may be termed, in legal parlance, reports. They are available in various compilations of disparate authority, the most famous of which are those named after Bukhari (d 870), Muslim (d 875), Dawud (d 888), Tirmizi (d 892), Ibn Maja (d 886) al-Nasai (d 915) and others. The Masnad of Imam Ahmad Ibn Hanbal is also a compilation of high authority. The Imam himself ranks as one of the great masters of Islamic Jurisprudence.

In the USA, the American Juggernaut has put most of the corpus of the Hadees now on computer disks and has suitably cross-indexed it. These disks are yet to arrive in this country. All this compilation, first in printed books and now on computer disks, has materially changed the position regarding the easy availability of primary and secondary sources of Islamic Law. Consequently, the reliance on secondary sources — the great Commentators and Tertiary Sources, the familiar Maulanas — has necessarily diminished world-wide. All this has happened comparatively recently.

The Quran itself and more so the other texts have become accessible in locally understood languages like Urdu and English only within the past hundred years. The Persian translation of the Quran, (the first out of Arabic) by Shah Walliullah of Delhi, came as late as 1750. The grip on the mind of the educated public of the traditional expositors, the Ulema, with their supposed knowledge of Arabic, has necessarily waned. Like Humpty Dumpty, they cannot get it back. Part of the outcry in the Shah Bano Case was caused by chagrin at this loss of monopoly.

The Great Jurists Of Islam

To return to the account of the legal doctrine, we must now consider the Five Great Masters of the Law. There are the Jurists who have established the five major Schools of Jurisprudence that to this day hold the field in Islamic Law. These are (1) Imam Jafar As Sadiq (d. Madina A.D. 765). He was invited to the court at Baghdad by Caliph Al Mansur, (A.D. 754) "that he might profit by his counsel". Jafar answered: "Whoever looks only to this world will not give you sincere advice; and who regards the next, will not keep your company." It was a political difference that kept Imam Jafar away from the Abbassid Court. Imam Jafar's legal writings and opinions now form the basis of the Shia Law, for this reason Shias are sometimes called Jafaris. It was until recently thought indelicate to cite Imam Jafar's view to Sunnis out of deference to Al Mansur. This reluctance is now waning.

(2) Imam Abu Hanifa (d 765) (held "the Great Imam" by Sunnis) was five years junior to Imam Jafar and is reported to have had high esteem for the latter. He combined great erudition with forensic talent. Imam Abu Hanifa included Hindus among Peoples of the Book. Most of the Indian Muslims are Hanafis. Imam Malik said of him, "if he were to assert that a wooden pillar was made of gold, he would prove it by argument". This remark possibly alluded to Imam Abu Hanifa's liberal ruling on alcohol. His authority is cited to permit, without severe censure, up to two whiskies provided the drinker neither smirks nor giggles and observes conventional etiquette towards men and women [See Hedaya Vol IV chapter 46].

(3) The next to be noticed is Imam Malik (715-95). He taught jurisprudence and other disciplines at Madina. The Caliph Harun al Rashid visited him and asked if he would come to his court at Baghdad to teach his sons. "The pupil must come to the teacher", Malik replied. The Caliph apologised.

(4) The next in the line is Imam Shafi (767-820). Many regard him as the greatest jurist in Islam's history. Most South Indian Muslims are his followers. It was his dictum regarding Quran II.242 that helped the supporters of the Shah Bano ruling in favour of alimony for divorced Muslim women.

(4) The last of the "Greats" is Imam ibn Hanbal (780-855). He is distinguished both by learning and fortitude. He spent many years in the Caliph's prison and suffered scourging rather than recant his views. There is controversy about the ground of his imprisonment. It often happens that the publicly declared reason for a political act differs from the truth, especially when the ruler has something to hide. It seems unlikely that Imam ibn Hanbal's incarceration and maltreatment were unconnected with his views condemning Triple *Talaq* (which he and his followers have consistently upheld and recently reaffirmed to be illegal). This was a delicate issue because if his view had prevailed some dynastic siblings might have been declared illegitimate! The quick disposal of unwanted consorts has been a problem with many dynasties. English history students might remember such problems with Henry VIII who devised his own solution thereto! The Caliph al-Mutavakkil on accession released ibn Hanbal, received him with honour and offered him 1000 pieces of gold as compensation, which ibn Hanbal refused. Among his famous books is the Masnad, a strictly compiled version of the Prophet's dicta.

Much water has flown under the bridge since the days of Emperor Akbar when the Ulema revolted at the idea of giving him the right to arbitrate between the various schools. Now, largely due to better availability of texts, it is permissible to apply a Maliki Shafei or Hanbali rule to a

Hanafi case where justice so requires. [See Statement of Objects and Reasons, Dissolution of Muslim Marriages Act, 1939 printed in AIR Manual 3rd, 4th and 5th Edns.] The Egyptian and Pakistan Courts have gone far to harmonise the rules of the different systems of law. In Bilqis Fatima's case [1959 2 WP 321; 59P Lah 566] the Lahore High Court, later upheld by the Supreme Court, relied directly upon a Hadis of the Prophet despite a squawk from the Indian Editor of Mulla's *Mohammedan Law* [See op cit 16th Edn. pg. 297 retracted in 17th Edn.]. The Pakistan Court adopted the principle that breakdown of marriage permitted a wife to claim divorce as of right, without alleging fault of the husband.

In Imam ibn Hanbal's Masnad, earlier referred to, is the saying of the Prophet that needs to be better known today: "Fear the plaints of the oppressed, even of unbelievers (Kafiran) for they pass the barriers and pierce all veils (to God)."

This unchallenged dictum of the Prophet is binding on every Muslim in the world, it is relevant today in view of Saudi Arabia's riding roughshod over human rights [particularly of non-Muslims and women]. It is ironical that they claim to be Hanbalites! If given publicity it should help where Qadianis in Pakistan [alleged unbelievers] are reportedly persecuted. It should also deter the Hizbul Mujahideen, who claim to be Muslims, from allegedly persecuting Pandits in Kashmir.

In India Hanbalites [sometimes referred to as Wahabis] were prominent in the Revolt of 1857 against the British. Many were killed in cruel ways, by being shot off canons etc. Many fled to the mountains for refuge. The Wali of Swat was said to be a Wahabi. For this reason they are not mentioned in pro-imperialist writings. Under pressure of British persecution they changed their name to the nondescript Ahl-e-Hadis [followers of the Hadis] that all Muslims are.

Muslims are free to adhere at will to one or the other school of law. There is not much difference among the four Sunni Schools. Regarding intestate succession there are different rules for the Shia and Sunni Schools. The founder of Pakistan, Mr M.A. Jinnah, died intestate leaving a large property. There was competition between his heirs: some said he died a Shia. Others alleged that he died a Sunni. All he had answered to those who asked him this question was, "What was the Prophet?" The Karachi High Court pondered over the case for several decades. Ultimately it was settled out of court! We are facing juristically an existing period in the development of Muslim Law!

(From, *The Lawyers*, July 1993).

16

Heera Nawaz

Section 10 of Indian Divorce Act: Need for Amendment

A, AN ATTRACTIVE CHRISTIAN WOMAN had an arranged marriage at the age of nineteen with a young man who at that time seemed amiable. Both of them being Christians, they were married in accordance with Christian rites. Two months after the marriage her bubble of happiness burst as her husband left her — desolate and in early pregnancy — never to return for the next eight years. Her parents however, never lost hope of her husband returning, perhaps because they were burdened with a "deserted" daughter and her now seven year old son. In fact, so eager were they for a re-union, that when A, a few months ago, became friendly with an understanding man in the office where she worked, her parents threw her out of the house labelling her a "flirt", with no intentions of being re-united with her former husband.

A felt a desire to sort out the problems of her life and thinking that law has a panacea for all ills, visited a lawyer. His words though were hardly heartening. The lawyer had this to say after listening to her story: "Christians married according to Christian rites (this does not apply to Christians married under the Special Marriage Act, 1954) can seek divorce under S. 10 of the Indian Divorce Act under seven possible grounds. The grounds appropriate for your case is that you should prove that your husband is guilty of desertion, without reasonable excuse, for two years or upwards, coupled with adultery."

Imagine A's dilemma! She did not even know her husband's whereabouts since the preceding seven and a half years, leave alone whether he had committed adultery. For no fault of hers, she would have to continue to lead her almost "ostracised" life without getting a divorce, which would, therefore, limit her chances of getting re-married. This is yet another

example of how our "man"-made laws defeat justice and women are discriminated in the eye of law.

Discriminatory Divorce Laws

This case is representative of hundreds of cases in our country where the Indian Divorce Act discriminates against Christian women seeking divorce in a court of law. What exactly does S. 10 of the Indian Divorce Act say?

> "Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnisation thereof, been guilty of adultery.
>
> "Any wife may present a petition to the District Court or the High Court, praying that her marriage may be dissolved on the ground that, since the solemnisation thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;
>
> or had been guilty of incestuous adultery,
>
> or of bigamy with adultery,
>
> or of marriage with another woman with adultery,
>
> or of rape, sodomy or bestiality,
>
> or of adultery coupled with cruelty as without adultery would have entitled her to a divorce *a mensa et toro*,
>
> or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.
>
> "Every such petition shall state as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded."

This section shows that Indian Christian women alone have the extra burden of proving adultery coupled with offences like bigamy, cruelty, incest or two or more years desertion. (The only ground in which a Christian woman does not have to prove adultery is if her husband has committed rape, sodomy or bestiality.)

Correspondingly, her husband only has to prove adultery. This difference is violative of Articles 14 and 15 of the Constitution. Perhaps this could be challenged through public interest litigation.

Similar Problems, Dissimilar Laws

How do other laws treat women from other religions? At the very outset, in our so-called "secular" state, it does not seem right that women for the same vicissitudes, problems and circumstances, should be tried by four different sets of laws for four different communities, namely Hindus, Muslims, Christians and Parsis. Women's problems are similar and do not vary according to the religion which they follow, so why should there be different grounds to get a divorce and why should the women be accorded different degrees of relief by the court?

Hindus who are governed by S. 13 of the Hindu Marriage Act, 1955, clearly come out way ahead with a fairly wide area of grounds for dissolving their marriages — adultery, cruelty, desertion for two years or more, conversion to another religion, suffering from a virulent and incurable form of leprosy or venereal disease in communicable form, renunciation of the world by entering any other religious order or not having been heard of as being alive for a period of seven years or more.

A point worth mentioning is that if the Hindu Marriage Act, 1955 could be so revolutionary in bringing about the idea of divorce to Hindu people who previously held marriage to be indissoluble, why cannot legislators, lawyers and social workers take a cue from this example and initiate amendments in the Indian Divorce Act by striking down discriminatory Christian Divorce Laws which have been in practice for over 120 years?

Muslim Law too discriminates against women, although there are provisions like *khula* for divorce by mutual consent. According to A. Fyzee in his book, *Outlines of Mohammedan Law*, a Muslim woman can be divorced by her husband and he is not necessarily under an obligation to assign any reason for his ultimate rejection of his wife. When he gives *talaq*, it is not even necessary that his wife be present at that time!

The fourth main community influenced by Personal Laws are the Parsis. A Parsi woman may get a divorce on the grounds of non-consummation due to wilful refusal of the husband, adultery, fornication, rape or an unnatural offence, grievous hurt, infection from venereal disease, being compelled by the husband to submit to prostitution, imprisonment of the husband for seven years or more, apostasy etc.

The Special Marriages Act, 1954 provides for divorce by mutual consent, which is comparatively a better way of getting a divorce, than when only one party condemns and makes wild allegations against the other party in open court. In the Indian Divorce Act however, if the couple come together to manipulate facts in order to get a divorce, it is termed as "collusion" and the couple can be prevented from getting the divorce.

Elusive Justice

Women of other communities have to prove only one ground for a divorce, whereas if a Christian woman proves only one ground, she gets only a judicial separation — an unhappy via-media between the married and divorced status. This has serious repercussions if she has any desire to remarry.

B's case is an example in point. B had an affair before marriage with a young man. Afraid of scandal, B's parents got B married to a man who right from the start seemed suspicious of her. Though she conceived within wedlock, her husband alleged that the child to be born was not his and in a jealous rage forced B to get aborted. B, at her wit's end swallowed a number of pills in a bid to end her life but was fortunately saved by her neighbours. The worst repercussion of the case is that although she can prove cruelty, she cannot provide circumstantial evidence to prove adultery in a court of law and like A, is unable to get a legal divorce from her jealous husband.

In such situation of sheer desperation, women feel compelled to allege false charges against their husbands in order to obtain the divorce, because the law demands it. A law which compels people to lie and collude in order to get legitimate relief, obviously has something very wrong with it.

It is high time that the disputes from man-woman relationships are solved by a uniform code of marriage and divorce rather than un-uniform laws which hamper justice. This will greatly help women to come together on a common platform. Personal Laws tend to hedge them in and restrict the action they are able to take within the sphere of law. The time has come for a complete reform of the law of marriage and the enactment of a uniform law applicable to all people irrespective of religion or caste.

(From, *The Lawyers*, November 1988).

Editor's note: Since this article was written, the Kerala High Court, in Sonia Zakaria's case, has struck down Section 10 of the Indian Divorce Act on the ground that it is arbitrary. The effect of the judgement is that Christian women in Kerala can now get a divorce on the ground of adultery or cruelty or desertion.

17

P. M.Bakshi

Age of Marriage in Hindu Law

According to ancient Hindu Law, a girl can choose her husband three years after she becomes marriageable [Mayne, *Hindu Law and Usage* (1991), pg. 122, para 113, cites the Sanskrit texts in this regard]. The Child Marriage Restraint Act, 1929 punishes marriage below a certain age, but does not provide that a marriage which violates the provisions of the Act is void. This was decided by the Calcutta High Court in *Ram v/s. Chand* [ILR 1937 (2) Cal 764], in the first decade after the Act came into effect. Though S. 5(3) of the Hindu Marriage Act, 1955 prescribes the minimum age of marriage to be 18 years for women and 21 for men, a breach of this condition does not render the marriage void [*Leela Gupta v/s. Lakshmi Narain* AIR 1978 SC 1351, 1353].

Vacuum in the Law

This leaves a vacuum in the Civil Law. At what age can a Hindu girl consent to marry? We have no statutory provision on the point. According to the Mitakshara, capacity to marry was on the completion of the sixteenth year, and under Dayabhaga, on completion of the fifteenth year. What then is the minimum age for a valid marriage of a Hindu girl or a Hindu boy?

Old Hindu Law takes the age of discretion to be the age of a valid marriage. Probably, this rule still survives, because the Hindu Marriage Act, 1955 is silent on the point.

Marriage Below Majority

In a well known Bombay case [*Purshottamdas Tribhuvandas v/s. Purshottamdas Mangaldas* (1887) ILR 21 Bom 23], it was stated that in Hindu society, children have no option and that the marriage was arranged by the parents. But according to the old texts of Hindu Law, the girl could

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choose her husband 3 years after she becomes marriageable. According to Kautilya, the age of discretion is 12 years for girls and 16 years for boys. The code of Manu also permits marriage 3 years after attaining marriageable age. In view of the rather incomplete provisions in the Hindu Marriage Act, these rules of Shastric Law may still bear some utility.

Abduction and Fraud

Hindu Law makes it very clear that if a girl is abducted by force or fraud and is married against her will, then the marriage would be invalid, even if the girl is a major under Hindu Law [*Vimla Bai v/s. Shankar Lal* AIR 1959 MP 8; Mayne, *Hindu Law and Usage* (1991), pg. 122. para 112, footnote 3 also refers to the English case of *Scott v/s. Sebright* 12 PD 2, in the context of fraud]. Fraud in marriage has been discussed by Mayne [*supra* pgs. 212 and 213]

In *Scott v/c. Sebright* (supra), the woman was engaged to a man and found herself in financial distress. The man told her to marry him in order to avoid bankruptcy. He also threatened to shoot her if she did not give her consent to marry. It was held that consent of the girl was obtained by fraud.

Consent to Contraception

In an important English case relating to consent to marriage [*Gillick*, 1985], Victoria Gillick sought a declaration that a circular of the department of health and social security was unlawful, because it permitted doctors (in exceptional circumstances) to give contraceptive advice and treatment to persons under 16 years, without the consent of their parents. The Plaintiff wished to get this circular quashed. She lost in the High Court. In the Court of Appeal, she obtained a unanimous decision in her favour. However, in the House of Lords in 1985, she lost by a majority judgement of 3:2. A number of principles seem to have been involved in this judgement. What stands out, is a balancing of the duties of the parents in regard to controlling the person and property of the child, as against the right of the child to make his or her own decisions when he/she is capable of making up his/her own mind on the matter requiring decision.

Lord Scarman, who delivered the majority judgement, observed:

"...I would hold that as a matter of law, the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates, if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law. Until the child achieves the capacity to consent, the parental right to make

the decision continues save only in exceptional circumstances. Emergency, parental neglect, abandonment of the child or inability to find the parent are examples of exceptional situations justifying the doctor proceeding to treat the child without parental knowledge and consent; but there will arise, no doubt, other exceptional situations in which it will be reasonable for the doctor to proceed without the parent's consent."

This judgement may, at first sight, appear to be irrelevant to consent to marriage. But, in reality, it is very useful in bringing out some of the crucial issues.

Position in the Shastras

In Vedic times, adult marriage appears to have been common. But in the Sutra period, a change occurred. The husband was an adult but the wife was often a child. Nevertheless, abducting a girl by force or marrying her by force did not result in a valid marriage.

The same position was laid down by almost all major High Courts in British India [*Ghazi v/s. Sukru* 1897 ILR 19 All 515; *Bai Diwali v/s. Motoi Karson* 1898 ILR 22 Bom 509; *Appibai v/s. Khimji Cooverji* 1936 ILR 60 Bom 455]. As early as 1871, The Calcutta High Court in *Aunjona Dasi v/s. Prahlad Chandra* [1871 (6) Beng LR 243, 254], held that if a marriage is invalid under Hindu Law, the girl may, in proper cases not only declare the marriage null and void, but also restrain the person alleging himself to be entitled to the right of a husband from enforcing any claim to the custody or person of the woman.

Sacrament and Contract

Some misconception seems to have been created by the statement that a Hindu marriage is a sacrament. But it is a half truth. Marriage may be a necessary *"samskara"* as held in *Kameswara Sastri v/s. Veeracharlu* [1911 ILR 34 Mad 422], but that does not mean that it is only a sacrament. The very fact that the Gandharva form of marriage was accepted shows that marriage by consent was recognised. The Grihya Sutra of Asvalayana refers to the Gandharva wedding in these words: "He may marry her after mutual agreement has been made."

Manu also envisages that the Gandharva marriage rests upon agreement and springs from mutual love. Of course, this does not mean that no marriage ceremonies (rites) are to be performed. Marriage ceremonies are common to all forms of marriage [*Kamani Devi v/s. Kameshwar Singh* 1946 ILR 25 Pat 56, 68]. The *Smritis* empower a maiden who is not given in marriage by her father within 3 years after attaining puberty, to choose for herself a bridegroom of equal caste [Manu, chapter IX, verses 90-93].

Right of Repudiation

Before 1978, the Hindu Marriage Act contained a provision for guardianship in marriage. The right to arrange for the marriage of a minor girl was given to the father, the next preference being the mother, then the paternal grandfather, and so on. In 1978, this provision in the Hindu Marriage Act was removed. At the same time, by the same Act, an additional ground of divorce for Hindu girls was inserted in S. 13(2) of the Act, providing that if a girl is married before the age of 15, she may, after attaining 15, but before reaching the age of 18 years, repudiate the marriage.

According to this provision, it is immaterial whether the marriage has been consummated or not, provided the repudiation is made before attaining the age of 18 years. To some extent, this provision, while impliedly recognising the validity of the marriage in the first instance, improves the position by giving a right to seek divorce.

Of course, the case of a girl marrying after the age of fifteen and before the age of eighteen still remains a fertile ground for controversy. The reason is that on the one hand the marriage continues to be valid notwithstanding the fact that it is punishable in law. On the other hand, the Hindu Marriage Act does not provide that such a marriage is void or voidable. Indirectly, the amendment of 1978 by maintaining silence on the subject, regards it as valid. Probably, the legislature thought that after the age of fifteen, the girl would be mature enough to decide about her matrimonial life even though, as a matter of health and family planning, she should be prohibited, by a penal sanction, from entering into a marriage. The situation illustrates the well known proposition that different sets of values operating in different spheres of human life may sometimes justify varying rules of morality or of legislation in different spheres.

Someday, one hopes an enlightened judiciary properly aided by well read lawyers can be persuaded to take the view that a marriage below the age of discretion — that is, discretion in matters of marriage — should be regarded as a nullity, or at least voidable at the option of the girl. For coming to such a conclusion, it will be necessary of course, to draw upon the doctrine of justice, equity and good conscience; to explore the theoretical discussions regarding free consent; to go deeply into some of the classical texts of Hindu Law and probably to study what society thinks on the question. The last consideration is important, because in a matter of this nature, the judge cannot be totally blind to social thinking.

Free Consent

Child marriage under civil law cannot be satisfactorily dealt with, unless one bears in mind the aspect that consent is as much an element of marriage as it is of any other transaction. Whether or not marriage is a "contract" in every respect, there can hardly be any doubt that free consent is required. Those judicial decisions which hold that violation of the Child Marriage Restraint Act, 1929 does not invalidate the marriage, do not go deeply into this aspect, because the point was not argued in that manner. The matter definitely requires much deeper study than has been devoted to it so far.

(From, *The Lawyers*, December 1991).

18

P.M. Bakshi

Marriage by Force: Reform the Criminal Law

IN ANY CIVILISED SOCIETY, marriage requires free consent. The so-called "marriage by capture" described in some old texts, if it ever was in force, never seems to have had legal validity. This type of marriage might have been prevalent at sometime, but subsequently, the norm was that whatever the form of marriage, the consent of the girl (or in certain cases, the consent of her guardian) is required. Mayne (*Hindu Law and Usage*, 1991, pg.108), makes it clear that the *"Rakshasa"* form of marriage was not approved. Rather, the very name shows condemnation of the marriage. He further adds:

"The true meaning of the *Rakshasa* and *Paisacha* marriage appears from the texts of Baudhayana and Vasishtha. Baudhayana expresses it affirmatively: 'If one has intercourse with a maiden who is sleeping intoxicated or out of her senses (with fear or passion) and weds her afterwards, that is the rite of the *Paisachas'* [Baudh I, II, 20, 9]."

Vasishtha negatives the possibility of any legal nexus otherwise: "If a damsel has been abducted by force and not been wedded with sacred texts, she may lawfully be given to another man, she is even like a maiden." [Vas.. XVII, 73].

Criminal Law

Sections 356 to 369 of the Indian Penal Code, 1860 deal with kidnapping and abduction. If a person is kidnapped and conveyed beyond the limits of India without consent, it is an offence under S. 360, punishable under S. 363. Consent may be given by some person legally authorised to consent. Again, taking or enticing any minor (under 18, if a female; under 16 if a male) out of the "keeping" of the minor's guardian without the guardian's consent, is an offence punishable under Ss. 361 and 363.

Abduction is a wider concept. Under S. 362 whoever by force compels, or by any deceitful means induces any person to go from any place, commits abduction. But abduction is not in itself an offence. It becomes punishable where the "intention" is to murder the person abducted or to wrongfully confine that person or hurt him, etc.

There is one specific section for the abduction of women. Under S. 366 (so far as is material), whoever kidnaps or abducts any woman "with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will" is punishable. It is also an offence under this section to kidnap or abduct a woman in order to force or seduce her to illicit intercourse. Under S. 366 the abduction comes first and the marriage or illicit intercourse comes later in point of time. The situation where the woman is first married against her will and then abducted remains uncovered by the law. To cover this situation, it is desirable to add in S. 366 (after the words) "compelled to marry any person against her will", the words "or knowing or having reason to believe that she has been married against her will".

Slavery

Sections 370 and 371 of the Indian Penal Code, 1860 punish the act of importing, buying or selling etc., a slave. Habitually indulging in such conduct is also punishable under S. 371. If a woman is forced to marry against her will and forcibly taken away with almost total loss of freedom, it would be a plausible argument to say that she is practically deposed of as a "slave". However, to put the position beyond doubt, one could add an explanation to these two sections. This explanation will deem disposing of a person by forcible marriage to be disposal of that person as a slave.

Buying and Selling Minors

Sections 372 and 373 of the Indian Penal Code, 1860 punish the act of buying or selling minors for the purposes of prostitution or illicit intercourse. Illicit intercourse is defined as "sexual intercourse between persons not united by marriage or any union or tie which, though not amounting to marriage, is recognised by the Personal Law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation". These sections do not cover sale, etc. in connection with forcible marriage. Thus, S. 372 punishes a person who "sells, lets to hire, or otherwise disposes of any person under the age of 18 years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and

immoral purpose". It seems desirable to add the words: "or for living as the wife of any person to whom she has been married against her will or to whom she is going to be married against her will". Similar amendments should be made in S. 373.

Statutory Interpretation

It is possible that expressions used in the relevant sections (dealt with above) may be interpreted so as to cover forcible marriage. But as is well known, penal statutes are generally construed strictly. There is considerable wisdom in this approach, even though many persons do not show sympathy for it. People concerned with the prosecution of criminals often express unhappiness with this maxim or rule. Nevertheless, the rule is, by and large, a sound one, because, in the absence of any such guideline, it is possible that a criminal statute may be abused, misinterpreted or wrongly applied in a situation where ordinary citizens thought it to be inapplicable. For this reason there is need to reform the relevant provision. In the absence of clear and explicit language, even the police sometimes find themselves unable to think of initiating a prosecution. Besides, the absence of clear and explicit language necessarily leads to a position where different High Courts and different law enforcing agencies may resort to different and conflicting interpretations. Such a situation will mar the symmetry and elegance of the legal system.

(From, *The Lawyers*, November 1991).

Part Three

Grounds of Divorce

19

P.M. Bakshi

Desertion by Wife

OUR MATRIMONIAL LAW is gradually being enriched with newer interpretations of certain basic concepts. In the law of divorce, the two grounds most frequently invoked are, cruelty and desertion. Cruelty, as interpreted in recent times, focuses attention on the effect which certain conduct of a spouse is likely to have on the other spouse. Desertion emphasises the intention of the deserting wife to leave the matrimonial home or in some other manner to reject the matrimonial alliance. Both the concepts are easy to formulate, but not always so easy to apply concretely. Sometimes, one finds that in administering these concepts the court has to balance conflicting social desires and to strike a new path that will solve, or try to solve, problems created by social tensions.

Desertion Justified

A discussion of the difficulty of performing this task may well begin with an illustrative Andhra Pradesh case, *D. Rajeswaramma v/s D. Ramamohan Choudhary*, [(1987) 6 Ind Jud Reports (AP) 166]. In that case, the wife was placed in a situation which now seems to be recurrent. She was made to live with her parents-in-law, while the husband was posted at a different place. There was some misunderstanding between the wife on the one hand and her mother-in-law and sisters-in-law on the other hand, in regard to jewelry. In the circumstances, the wife started living with her own parents and the husband filed a petition seeking divorce on the ground of desertion. The wife denied the allegation and pointed out that there was a just cause for her living separately. A Division Bench of the High Court (Mrs Justice Amareshwari and Mr Justice Bhaskar Rao) held that the wife was justified in living separately in the circumstances. The crucial reasoning, as given in the judgement, is as under:

"The husband was admittedly working at Uravakonda. There were misunderstandings between the mother-in-law and sisters-in-law on one hand and his wife. In the circumstances, her demand that he should live

separately cannot be said to be unreasonable. If the husband was living in Anantapur along with his parents, it would be a different matter. But he was working at Uravakonda and the wife cannot be expected to live in a house with the parents-in-law in the absence of the husband. In the circumstances, it cannot be said that the desertion by the wife is without any reasonable cause."

Social Situation Crucial

The above judgements of the Andhra Pradesh High Court shows how the real cause of litigation lies in certain social situations. Sometimes, the courts take account of the reality and go more by the necessities of the case, than by the supposed faulty conduct of either party. In a Punjab case, *Nirmal Jeet v/s. Harbans Singh*, [(1987) 6 Ind Jud Reports (P&H) 157], the husband petitioned against the wife on the ground of desertion. The petition was granted, because the parties were living apart for more than five years. The wife made allegations of beating against her husband and father-in-law, but could not prove the same and the court found them baseless. Within three months after marriage, the wife had withdrawn from the society of her husband and thereafter did not return to her husband. Efforts by the husband to bring her back, the court felt, would not succeed in the circumstances. Thus, there was no reasonable cause or excuse for the wife's withdrawal and the husband was granted divorce.

At times, there is clear proof of the intention to desert on the part of a spouse and the justice of the case demands that the marriage should be dissolved. A rather novel situation was presented in this context in a Delhi case, *Ashok Kumar Arora v/s. Prem Arora* [(1987) 6 Ind Jud Reports (Delhi) 170]. The husband suspected that the wife was leading an immoral life before marriage. The marriage took place in 1970 and in February, 1972, the wife left the husband, leaving her son also with the husband. In a letter, the wife herself confessed that before marriage she had been operating as a call girl and felt that it would not be possible for her to live with the husband any more. The High Court construed this letter as evidence of her intention to bring the cohabitation permanently to an end. Incidentally, the court pointed out that "desertion" means the intentional permanent forsaking and abandonment of one spouse by the other without the consent of the other spouse and without reasonable cause [*Lachman v/s. Meena,* AIR 1984 SC 45]. Some controversy arose in the Delhi case as to whether the letter or so-called deed of divorce was in fact signed by the wife. The wife made an allegation that the husband had created false evidence and also that her signature had been obtained through coercion. The document was written in Hindi as well as in English. An interesting feature of this case was that a lady handwriting expert was called to prove

that the document was a genuine one. The expert gave her considered opinion that the disputed signature and writing were written by the wife. This opinion was given on the basis of comparison with admitted and specimen signatures and writing of the wife. The wife did not produce any expert evidence in rebuttal. While in her pleadings she had said that the signatures were obtained through coercion "at dagger's point", in her cross-examination in the court she completely denied her signature. On the basis of the evidence, the court held that the wife had signed the document in question.

Constructive Desertion

Sometimes one comes across the legal concept of "constructive desertion". In such a situation, the spouse apparently deserting has a justification for doing so because of the conduct of the other spouse. A Punjab case, *Prempati v/s. Ranbir Singh* [(1987) 6 Ind Jud Reports (P&H) 117], formulates the concept of constructive desertion in these words:

"Where a spouse is forced by the conduct of the spouse to live separately or to stay away, the desertion is not to be attributed to the spouse who lives away separately or stays away because the situation of separation has been brought about by the act of the other spouse, who has misconducted. As a consequence of the misconduct and misbehaviour of one spouse when the other spouse is forced to stay away, the offending spouse is presumed to have intended that such an eventuality will take place. Where parting of the spouses has arisen in such circumstances, it is called constructive desertion and the spouse responsible for creating the situation in which the other spouse is forced to stay way is guilty of constructive desertion."

In the above Punjab case, the wife's allegation, that she had been given a beating by the husband and turned out of the house was corroborated by the evidence. She went to her parents' house and stayed there for more than two years preceding the date of presentation of the matrimonial petition. It appears that the wife was a teenaged girl of 15 years at the time of marriage and was married to a widower who was 56 years of age. Her petition was based on the ground of cruelty as well as desertion by the husband. Some efforts at reconciliation had failed and in the circumstances, the court held that the wife's staying apart was justified and that it was the husband who had wilfully neglected his wife in terms of S. 13(1), second explanation in the Hindu Marriage Act. The court described the situation as an instance of "incongruous matrimonial alliance".

During the last few years, one also comes across cases involving a second marriage by the husband and its legal impact on the wife's right to

maintenance. As regards Hindus, S. 18(2) of the Hindu Adoptions and Maintenance Act, 1956 provides that a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance in certain enumerated situations, including the following:

"(e) If he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere.

"(g) If there is any other case justifying her living separately."

Where the husband marries again, the situation is covered by clause (g) quoted above and the wife is justified in living separately, even though the woman is not a "concubine". It has been so held by the High Court of Karnataka -- *P. Bhadra Reddy v/s. A.M. Shanthamma* [(1987) 6 Ind Jud Reports (Kar) 121]. The Karnataka High Court described clause (g) as a general provision which includes, within its ambit, situations which may have been excluded in other specific clauses but which would justify the wife's right to live separately and claim maintenance. It should be mentioned that failure to give separate maintenance, in circumstances where an obligation to maintain arises in law, would be a ground for divorce.

Conflicting Evidence

Occasionally, courts are faced with conflicting evidence and it is difficult to decide which of the conflicting factual versions given by the two spouses is correct. Decisions in such cases often depend on the inferences about mental intent, to be drawn from facts showing conduct. Thus, in a Delhi case, *Hem Chandra Misra v/s. Satya Misra* [(1987) 6 Ind Jud Reports (Delhi) 120], there was a long standing dispute between the spouses and moves for reconciliation did not succeed. The wife was charged with desertion by the husband who petitioned for divorce, while the wife made counter allegations of physical and mental torture. It appears that the wife had sued for return of her dowry after she left the husband's house and at a meeting for reconciliation, it was agreed that she would withdraw the suit for return of dowry and the husband, in his turn, would withdraw the petition for judicial separation which he had filed. The husband withdrew the petition and the wife came back; but she refused to withdraw the suit on the ground that she was not treated well by her husband after she rejoined him. She again left the home. The High Court drew the inference that her conduct in pursuing her suit for the return of her dowry signified that she had no intention of resuming cohabitation with her husband. In the circumstances the wife was held guilty of desertion.

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P.M. Bakshi

Insanity and Divorce

UNDER S. 13(1)(iii) of the Hindu Marriage Act (as amended), a marriage may be dissolved by a decree of divorce on the petition of either the husband or the wife, on the ground that the other party to the marriage has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent, that the Petitioner cannot reasonably be expected to live with the Respondent. It will be noticed that two alternative situations are envisaged by this provision. Either there must be proof of incurable unsoundness of mind or there must be mental disorder of the requisite quality. Courts are not very liberal in granting divorce on the grounds of insanity. They insist on rather strict compliance with the requirements of the law. Recent judicial decisions are of interest, as they illustrate the general approach of the courts.

Poor Medical Evidence

Cases alleging insanity, and seeking divorce on that ground sometimes fail because of poor medical evidence, as is illustrated by a Bombay ruling. The husband sought divorce on the ground that the wife was suffering from mental disorder of such a kind and to such an extent, that he could not reasonably be expected to live with her. He thus attempted to bring his case within S. 13(1)(iii) of the Hindu Marriage Act. Medical evidence was produced in support of the allegation. However, the trial judge did not give much credence to that evidence, for two reasons. First, the doctors were not specialists in psychological medicine. Second, their testimony did not inspire confidence.

One of the doctors had in his evidence admitted that the wife was otherwise healthy — physically and mentally and that her ailment could be cured. Further, the factors supposed to be causative of the wife's fits had been told to the doctor by the husband and never by the wife. The other

doctor who had examined the wife was a gynaecologist, who in her cross-examination, deposed that the wife was suffering from hysteria, for which a long term treatment was necessary. According to the Trial Court, this implied that the disease was curable. The husband did not succeed in the Trial Court.

On appeal to the High Court also, the husband failed. The High Court did not, in the circumstances of the case, consider it proper to interfere with pure findings of fact [*Bhaskar P. Mahatma v/s. Meerabai N. Mahatma* 1983 HLR 584 (Bom)].

Unsatisfactory Pleading and Proof

Petitions in matrimonial matters sometimes fail because the matters necessary to be established are not set out precisely in the petition. In a Delhi case, it was held that the initial ingredient of the provision in S. 13(1)(iii) in the Hindu Marriage Act (second limb) is that the illness is of such a kind that the Petitioner cannot reasonably be expected to live with the other party. In this case the Petitioner had not even made any such allegation or averment in the petition.

The story put forth was that on enquiries by the Petitioner, it was revealed that the wife was having fits. But the court held that it did not lead to the conclusion that the illness was such that the husband could not "reasonably be expected to stay with the wife". Divorce was refused [*Prabhat Bhushan Bhatnagar v/s. Mridula* 1985 (8) D.R.J. 60 (Delhi)].

There are a few other cases in which the need for proving the requirement of insanity has been emphasised. In *Bhupinder Singh v/s. Harbans Kaur* [1929 HLR 616] the husband had petitioned for divorce on the ground of insanity of the wife. The spouses had lived together for 11 years. The wife had not been aggressive towards her daughter and other members of the family. She was working in a public school and the principal testified that her behaviour during the work in the school was normal. From 1966 to 1976, the parties had lived together and there was no evidence that after 1976 she suffered from mental illness. It was, therefore, held that it had not been established that the mental disorder was of such a nature and extent, that the husband could not be reasonably expected to live with her.

Similarly, in *Gurminder Singh v/s. Surjit Kaur* [1981 HLR 24], the husband failed to state in evidence a single word to the effect that it would not be possible for him to live with the wife because of the mental disorder as alleged. He did not make any statement about her behaviour, from which it could be inferred that the mental disorder was of the requisite nature or extent. His petition for divorce was refused.

Pleadings and evidence in matrimonial cases should be precise and to the point. This is illustrated by another Delhi case. The wife's illness was described as "paranoid schizophrenia". Witnesses, however, failed to explain before the court the ingredients or symptoms of the disease. Nothing on record indicated that the wife continued to suffer from the ailment, or that the wife made the husband believe that it was not safe to live with her. The divorce petition was therefore dismissed.

In this case, a psychiatrist had appeared as a witness and deposed that the wife was suffering from mental disorder. He stated that four electric shocks were given to the wife, besides certain medicines and injections. The illness of the wife was diagnosed as "paranoid schizophrenia". According to the psychiatrist, this was a serious type of mental disorder and it could be termed as insanity. In cross examination, he admitted that the electric shocks were not given by him, but were given under his guidance by another doctor. He was unable to tell the cause of the mental illness. He was also unable to say as to how long it would take for his wife to fully recover. According to him it was not possible to explain the causes of the disease, as the same was not known to medical science. The High Court took the view that the witness hardly knew anything about the disease known as "schizophrenia". He had not explained as to what were the symptoms, when he examined the wife. He did not elaborate what the progress after the treatment was. Further, the psychiatrist had gone on to say that such a disease was not known to medical science, which was absolutely incorrect. The witness had not explained what "paranoid schizophrenia" meant. He had not even explained the ingredients or symptoms of this kind of schizophrenia. At best, the evidence showed that the wife was suffering from some mental ailment, which by itself was not enough to hold that it was not reasonably possible for the husband to live with her. The appeal of the husband was dismissed [*Narender Singh v/s. Bimla Kumari* 1983 HLR 31 Delhi].

The Liberal Approach

The above rulings show that it is not easy for a Petitioner seeking divorce on the ground of insanity to succeed in court.

However, occasionally, the courts do adopt a liberal approach, as is illustrated by a Punjab case. In that case, witnesses had given instances of the wife's conduct on different occasions, which clearly established that she was not a normal person and that her behaviour and conduct were abnormal. The wife, appearing as her own witness, admitted that after the marriage she used to lose her temper and had to be given medicines. Evidence established that the wife was suffering from schizophrenia. She

was aggressive and prone to abusing and cursing her husband, neglecting his food, remaining withdrawn and aloof, sleeping at odd hours and suspecting that her food had been poisoned. The second limb of S. 13(1)(iii), Hindu Marriage Act was held to have been established, namely, that the mental disorder of the wife was of such a kind and to such an extent, that the husband could not reasonably be expected to live with her. The decree dissolving the marriage between the parties passed by the trial court was maintained [*Vinod Kumari v/s. Major Surinder Moha*, 1984 HLR 508 P&H].

In another Punjab case, the wife had been suffering from mental disorder for more than a decade; and the husband tried his level best to get her cured. The wife however, left her matrimonial home and showed no inclination to live with the husband. Because of the mental delusion of the wife, it was not possible for the husband to live with her. From the outdoor patient's ticket, produced from the records of the hospital concerned, it was established that in the year 1972, the wife was found to be suffering from mental disorder, described as "paranoid schizophrenia". She was under the treatment of Dr Sarabjit Singh of Jallandhar in July 1978, and the mental disorder from which she was suffering was described as "mania depressive psychosis" (depression). In her statement before the court also, the wife admitted that she had got herself treated for her mental ailment in the hospital at Amritsar and from Dr Sarabjit Singh of Jallandhar. On these facts the court held that it was apparent that the wife had never been cured of the mental disorder which she developed within a couple of months of her marriage. She was still suffering from it in July 1978, when she left the matrimonial home and started living with her parents.

This inference also found support from the conduct of the wife, in as much as she handed over the custody of the children to the husband (which, according to her, was in their interest). Obviously, she found herself incapable of looking after the children because of her mental disorder.

The husband in this case had suffered the wife's company for more than a decade and tried his level best to get her cured. But it was no more possible for the husband to suffer the agony, particularly when the wife was continuously complaining of fear of death from him. In view of the above finding, divorce was granted [*Baldev Singh v/s. Bhupinder Kaur* 1982 HLR 146 P&H].

Conclusion

The upshot of this brief resume of selected case law is that a long period of mental disorder, accompanied by positive proof that the disorder was of sufficient intensity may induce the court to grant divorce. But anything

short of that may not suffice, and the court would then hesitate to dissolve the marriage on the ground of insanity. Great importance is also attached to the question whether the disease is curable, though that is not the only type of insanity recognised by law. In any case, the pleadings must be full and precise and the evidence as clear as possible. It is also useful to remember that the expert evidence produced in such litigation should be of high order.

(From, *The Lawyers*, November-December 1989).

21

Ravinder Joshi

Adultery — A Flagrant Violation of Woman's Dignity

THE FAMILY IS THE OLDEST and basic unit of every social structure, but its form continues to undergo diverse changes due to various socio-cultural and historical factors. The patriarchal form of family in itself is not only the oldest form, but it is an ideology which forms the base of even the present day bourgeois family. Bachofen in "Mother Right" specifically says that in the beginning, humanity lived in a state of sexual promiscuity, which he referred to as Hataerism. There is some dispute about the origin and development of the family among historians and anthropologists, but all the studies ultimately bring us to only one logical conclusion — that in every structure efforts were made to keep the family unit intact from outside interferences or influence.

The *Encyclopedia of Women's Studies* (Volume I) edited by Helen Tierney defines adultery as "voluntary extra-marital intercourse with a person of the opposite sex, whether unmarried (single) or married (double — adultery)". Ancient patriarchal societies (e.g. Amorite, Assyrian, Hebrew, Greek, Roman) did not consider extra-marital intercourse as adultery unless a married woman (or a concubine) was the offender.

Double Standards

The double standard, that only a woman's infidelity deserves serious punishment, has permeated thinking in all societies. It rests in larger part on the idea that a woman is the property of the male. In a few primitive societies, extra-marital relations have been freely permitted, although there have been periods when a woman's adultery in the upper level of society, if discreet, has been quietly tolerated (e.g. 18th Century western Europe).

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In the 14th century, Perugia, an adulteress wife was flogged out of town and exiled, while an adulterer husband was fined fifty pounds if the adultery was committed in his own house and was public knowledge. In 13th century Spain, adultery between a married man and a Muslim or Jewish woman was not considered an offence. But, for a woman, adultery with a Muslim or a Jew was the most disgraceful and harshly punished act she could commit.

In the United States, after World War II, only three states had no criminal penalties for adultery. In other states, the penalties ranged from a $10 fine to imprisonment.

Another anthropologist, Morgan, in constructing retrospectively the history of the family is in agreement with a majority of his colleagues, that in a primitive stage promiscuous intercourse prevailed within a tribe, so that every woman belonged equally to every man and similarly every man to every woman. But, now every school is trying to deny the existence of the initial stage in the sexual life of mankind with the only aim to spare humanity of this "shame". Engels in his "Origin of Family, State and Private Property" has dealt with promiscuous sexual intercourse. He says that the restrictions in force at present or in earlier times, did not exist. These restrictions came into being and were established by custom, but it does not follow necessarily that a higgledy piggledy promiscuity was in daily practice. Separate pairing for a limited time was in practice.

At that stage, one man lived with one woman, yet in such manner that polygamy and occasional infidelity remained a man's privilege. Even though the former is seldom practised for economic reasons, at the same time, strict fidelity is demanded of a woman during the period of cohabitation, adultery on her part being cruelly punished. Some of the earlier forms of marriage were marriage by abduction and marriage by purchase. The former is still in practice but in a modified and sophisticated manner.

Undisputed Paternity

F. Engels in dealing with the monogamous institution of marriage states that this institution arose out of the pairing family in the transition period; its victory is complete on the advent of civilization. It is based on the supremacy of the man, its expressed aim is the begetting of children of undisputed paternity; this paternity being required in order that these children in due time inherit their father's wealth as his natural heirs.

The monogamous family differs from pairing marriage in the far greater rigidity of the marriage tie, which can now no longer be dissolved at the pleasure of either party. Now, as a rule, only man can dissolve it and cast off his wife and the right of conjugal fidelity remains with him even now, sanctioned at least by custom. Its origin was not in any way the fruit of

individual love because this marriage remained a marriage of convenience as before. It was the first form of the family based on economic conditions, namely victory of private property over originally developed, common ownership rule. Engels also observes that along with the existence of monogamy, two permanent social figures unknown previously appear in the scene, viz. the wife's paramour and the cuckold.

A survey of the notions entertained by "savage" people regarding adultery tends to show that in the earlier primitive and savage times, it could not have been regarded in any other light than as the interference of another with the woman over whom a man had, or conceived himself to have certain rights. It was never considered as an act of impurity, for the idea of purity had not yet been evolved, nor was it a breach of contract, for it is improbable that any such thing corresponding to marriage rights was yet in use, nor was it a breach of social laws, for men were not organised in social groups. But, in this period, adultery was a breach of proprietary rights, to be followed when discovered and private revenge taken.

Roman Law

Under Roman Law, the word *adulterium* is a noun — derivative of *adulterare* which is probably *ad adultrum*. It defines the offence on the part of the wife as sexual intercourse with any man other than her lawful husband. Originally the offence was dealt with not by the state (except in cases where it passed all bounds and became like open immorality, a matter for the police jurisdiction of censors and aediles). If a wife was divorced on the ground of adultery, it was left for the Civil Court to decide what part of her dowry she should retain. Under the empire, after the end of the first republic, Roman Law recognised adultery as an act done in contravention of the law of the state and allowed persons other than the fathers and husbands of the adulteress to prosecute. For this purpose, a new court was also established. The law fined an adulteress by forfeiting one half of her dowry and one third of her property; the adulterer also lost half of his property. But this punishment was soon replaced by exile or deportation to an island and the law further prohibited the remarriage of the adulteress, but she could enter the condition of concubinage. The husband could himself detain the adulterer for 24 hours in order to secure the evidence of the offence. An adulteress could be sentenced to life in a nunnery, unless the offended husband cared to reclaim her within two years.

Greek Era

During the Greek era, in Athens, adultery on the part of the wife amounted to criminal intercourse. On neither side was the offence regarded

as violation of the sanctity of a binding obligation, but as an offence against the sanctity of the family. The punishment prescribed for an offender if he was caught by the husband, was: the adulterer could be killed at once or in some cases, the husband would agree to accept a sum of money in compensation for the wrong done to him. But a woman who committed adultery could be repudiated by her husband and further she could be excluded from public temples and even then if she refused compliance, could be expelled with impunity by any citizen. Such an assailant while doing the same, could tear off her clothes and ornaments, but could not maim or kill her (Neoer 87; Aeschin in Timarch 183). There was another punishment ordained by Zaleucus, in which the Locriam legislated the punishment of binding, and in Pisidia the adulteress was paraded on an ass.

Buddhist View

Under Buddhism, one of the five precepts in verse says: "Let the wise man avoid unchastity as if it were a pit of live-coals. If he is unable to be celibate, let him not offend with regard to the wife of another." Adultery under Buddhist jurisprudence is also an act against the state and an offender could be arrested by the police and brought up for trial and judgement.

Jewish Jurisprudence

Under Jewish jurisprudence, the substitution of monogamy for polygamy made no changes in the Jewish Law on adultery. The law continued to regard as adultery any intercourse of a married woman with any man other than her husband. Thus, a married man was not regarded as guilty of adultery unless he had intercourse with a married woman other than his wife. The law of Moses prescribed stoning of a betrothed virgin if she had intercourse with a man other than her affianced husband. The punishment was subsequently modified into the divorce of the woman who would lose all her rights vested in her under the marriage settlement. The husband of the adulteress was not permitted to cohabit with her and was compelled to divorce her (Mishna, Sota vi 1; Mamonides hilch, ishuth, xxiv 6). The adulteress was also not allowed to marry her paramour. The sanctity of marriage was upheld as an essential condition for social happiness and virtue, and adultery was accepted as an offence against the same.

Egyptian View

During Egyptian times, adultery with a married woman was looked upon as a sin. In part ch 125 of the *Book of the Dead*, in 19th clause, we read: "I have not defiled the wife of a husband (viz. the wife of another man)." In one of the cases during this period, a man who committed adultery with

a wife of a peasant was eventually handed over to a crocodile to devour. The woman was taken to the north side of the palace (evidently a place of public assembly), burnt and her ashes cast into the river. Another implication of adultery for the wife was that her husband would have no obligation to maintain her if he had divorced her due to her adultery.

Christianity

Under Christianity, there is one command: "Thou shall not covet thy neighbour's wife" meaning, thou shall not commit adultery. The apostle does not ignore our duty towards our neighbour. Adultery of the wife has at all times been regarded as sufficient ground for divorce, but differences of opinion have prevailed as to whether the same rule applies to cases where adultery is committed by the husband. By the Civil Law of England, where a wife cannot obtain a decree of divorce on the sole ground of her husband's adultery, there must be other circumstances such as cruelty or neglect. St Paul no doubt acknowledged that adultery is a more grievous or irreparable wrong which can result in final and irrevocable exclusion from the church.

The Christian church officially insisted that adultery was as wrong for a husband as for a wife and that a wife's adultery could not be used as a ground for divorce. However, the idea that married men should be subjected to the same restrictions as married women, was never translated into the general consciousness of the Christian community or into their laws of medieval jurisdiction. The Protestant emphasis on family tended to strengthen the emphasis on the need for female purity whereas divorce was allowed where adultery was a cause. Laws against adultery were tightened subsequently in both Protestant and Catholic jurisprudence.

Adultery under Muslim Law is punished in a very severe form. As per Islamic Law, adultery should be punished with one hundred stripes. Originally, however, Muhammad had commanded that those who had been found guilty of this misdemeanor should be put to death by stoning. There are various instances in Muslim traditions, where this punishment has been inflicted at various times. But, in present day Muslim Law books, both punishment by stoning as well as scourging are found. It is further laid down that when a man catches his wife in the act of adultery he may put her to death at once along with her paramour. If he suspects her of adultery, then he can approach the court but he is not required to bring forward any witnesses. The law permits him to take an oath that his wife has been unfaithful to him, upon which the marriage stands dissolved and if she brings a child into the world, its legitimacy can also be disowned by the husband.

Hindu Law

The view which Hindus take of adultery is founded upon their conception of the nature of woman and marriage. In Hindu culture, the woman is conceived with a pessimistic idea of the inconstancy of the female character due to complaints of woman's unbridled indulgence of passion, and which demands the maintenance of strict oversight on her. It should be noted that a special high set of values for the wife has been formed who has to prove herself true to her husband (*pativrata*) and the law threatens adultery with severe punishment. The word adultery was literally unknown in the Vedic period, but numerous indications point to the fact that it was existing even at that time. In ordinary parlance, corruption of character and moral laxity were equated with women who betray their husbands (*patiripah*).

In Rigved IV 5.5: "Evil doers...who walk in evil ways, like women who betray their husbands, shall be consumed by Agni". The whole Hindu system is caste oriented and stratified accordingly in hierarchical manner by the brahmins and their ideologue Manu. Adultery was considered an imminent danger to their caste system established by brahmins and an attempt was made to obviate this danger by prescribing severe punishments. It is essentially from the standpoint of caste distinctions that adultery is condemned in the *Smritis*. Later on, a strict marriage law was developed and legal regulations were formulated in the *Smritis* with regard to adultery, even while polygamy and prostitution continued to exist.

The brahmins have special privileges with regard to adultery, as it is presumed that brahmins are in possession of the sacred secret whereby they can curse and inflict harm and, therefore, a man must refrain from adulterous intercourse with the wife of a brahmin. The proposed punishment was that whichever woman betrays her husband, the king shall order that she be torn to pieces by dogs in an open place. The paramour shall be roasted on an iron bed, or shall be thrown into the fire so that evil doers can be consumed.

The reflection of hierarchical caste stratification can also be seen from the fact of different punishments prescribed for adulterers or adulteresses belonging to different castes. If a woman from a higher caste commits adultery with inferior castes the king shall cause her to be torn to pieces by dogs in an open place. If an adulterer from a lower caste has committed adultery with a woman of higher caste he can be condemned to death.

In case of an act of adultery between a man and woman of equal caste, a woman shall be allowed to eat only sufficient to sustain life. If a higher caste man commits adultery with a lower caste woman, her head should be shaved off. If a brahmin man commits adultery with a vaishya woman or

kshatriya or with a woman from a lower caste, or for the first offence of committing adultery with a shudra woman, he shall be fined nominally.

Subsequently, the orthodox ideologue of Hinduism, Manu similarly graded the punishments according to the caste to which the offender belonged. For adultery with the wife of a man of one of the higher castes, a shudra is to be punished with confiscation of property and the cutting off of his organ of generation; if the woman involved in the act is under the guard and protection of her guardian, the sentence may even be death. In this case, a similar punishment overtakes the vaishya or kshatriya who is guilty of adultery with a brahmin woman, otherwise they escape with heavy fines, imprisonment, shaving off the head and watering on the head with urine. A brahmin, on the other hand, if he is guilty of a similar offence is only condemned to fines which are nominal and lower than those in the case of a kshatriya. The wife guilty of adultery may be repudiated and expelled from her caste. In certain cases, the king is enjoined to have the nose and ears of the adulteress wife cut off and in extreme cases, the aggrieved husband himself administers correction by cutting of his wife's nose and then repudiating her.

Modern India

In modern India, adultery is regarded in the same light as in ancient times, since the present law with regard to marriage and divorce is based upon the law books written by various brahmin thinkers and Manu. However the punishments and sentences imposed on the adulterer or adulteress have undergone a change due to increased socio-economic development and the change in the social status of woman.

As Indian society is multi-religious and multi-cultural, there is no Uniform Civil Code dealing with matrimonial disputes. As per S. 3 of the Hindu Marriage Act, 1955, the Hindus include Sikhs, Jains, Buddhists, Virashaivas, Lingayats or the Followers of Brahmo, Prarthana or Arya Samaj, but exclude Muslims, Parsis, Christians and Jews. The Muslim population is governed by Mohammedan Law. Similarly, the Christians are governed by Christian Law codified as the Indian Divorce Act. Parsis have their own separate Parsi Law. Due to higher levels of socio-economic development, there is an increase in inter-caste or inter-religious marriages. To deal with this complex situation, there is a Special Marriage Act.

Penal Code

Under the Indian Penal Code, S. 497 deals with the offence of adultery. This section says, "Whoever has sexual intercourse with a person who is and who he knows or has reason to believe to be the wife of another man,

without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both. In such case the wife shall not be punishable as an abettor."

In order to prosecute the offenders under this section, the only recourse is to file a criminal complaint under S. 198 of the Code of Criminal Procedure which specifically authorises only the aggrieved person to initiate prosecution. The section further says that for the aforementioned purpose, no person other than the husband of the woman shall be deemed to be aggrieved by the offence punishable under S. 497 of the Indian Penal Code. In exceptional cases, in the absence of the husband, the section prescribes that some person who had care of the woman on his behalf at the time when the offence was committed, may with the leave of the court, initiate prosecution on his behalf.

Intention of Legislature

The object and intention of the legislature in enacting this provision of Criminal Law was to preserve the sanctity of the institution of marriage. The further object of the provision is to protect the rights of the husband, because an act of adultery is considered an infringement of the rights of the husband. This view about the intention was upheld by the Supreme Court in 1959 [AIR 1959 SC 436]. Any external interference in the marriage is to be met with stiff resistance in the form of penal prosecution. This proposition has time and again been upheld by the Supreme Court.

The Madras High Court [AIR 1970 Mad 434] categorically observed that only one form of adultery has been made punishable under S. 497 and that is double adultery — with a married woman. Earlier, the Nagpur High Court [AIR 1947 Nag 121] held that consent of the woman in sexual intercourse is no defence. Further, an act of sexual intercourse with an unmarried woman, or prostitute or widow or with a married woman with the connivance or consent of her husband is not adultery under S. 497 [AIR 1959 Cal 451]. The Madras High Court observed that in prosecuting the adulterer, the husband has only to prove sexual intercourse with his wife by the adulterer without his consent or connivance [AIR 1953 Mad 422]. In certain cases, if a woman has been abandoned or shunted out by her husband, even then, if a person has sexual intercourse with the same woman it would amount to adultery [1963 (1) Criminal Law Journal pg. 312]. The Orissa High Court observed that the court cannot draw any inference of connivance from the fact that a woman had been abandoned by her husband [AIR 1963 Ori 60]. Even if the marriage stands dissolved, the husband has

the right to prosecute the adulterer by lodging a complaint and this view was taken by the Lahore High Court [AIR 1922 Lah 477]. In 1953, it was held that the wife cannot be punished as abettor under S. 497 as per the provision of the law contained in the Indian Penal Code [1953 Criminal Law Journal 765]. In 1985, the validity of the section came into challenge before the Supreme Court on the ground that this section is discriminatory against women, but the Supreme Court upheld the validity of the section by observing that there is nothing discriminatory between men and women in the section. It further held that there is no requirement for hearing the wife if the proceedings are initiated under S. 497 [AIR 1985 SC 1618].

It is not necessary to implead the person with whom the adulterous connection is alleged [AIR 1977 AP 68].

Apprehending the result of adultery, in 1988, the Punjab and Haryana High Court observed that the birth of an illegitimate child would certainly cause great annoyance to the husband [1988 (1) PLR 1]. In 1985, the Supreme Court observed that neither wife nor the husband can prosecute each other for the offence of adultery [1985 (1) Recent Criminal Reports 647 Supreme Court]. In 1985, the Supreme Court held that if the husband had sexual relations with an unmarried woman, S. 497 does not confer any right on the wife to prosecute her husband for adultery rather, the husband on the other hand has only the right to prosecute the adulterer [1985 (2) Recent Criminal Reports 271 Supreme Court]. A wife leading a life of adultery is not entitled to alimony and litigation expenses [1986 (1) CCC 764]. A complaint under S. 497 filed by a brother was held illegal and conviction was set aside [AIR 1937 Bom 186; AIR 1965 Allahabad 508 and Criminal Law Journal 1965 (2) 455]. The consent of the wife to deprive her husband of his proper control over her is not material in prosecuting the adulterer [AIR 1959 SC 436]. The Supreme Court, in 1985 [AIR 1985 SC 935] held that Indian Law concerning matrimonial relief in respect of Christian marriages is contained in the Indian Divorce Act, 1869. This statute is more than a century old and hopelessly outdated as it is based on the English matrimonial law of that time. The Indian Divorce Act, 1869 has remained unchanged for nearly 120 years while the English matrimonial law has undergone many changes.

Male Preserve

An analysis of S. 497 IPC along with the various observations by the Supreme Court of India and High Courts, bring us to the conclusion that only a man can commit adultery. The married woman who is involved in the conduct is not punishable as an adulteress, because she is treated as a "victim" not as "the author of the crime", because she has no entity and she

is a non-person. The section absolutely negates the free will of women in adulterous conduct and does not concern itself with the intentions behind her act. Further, women whose lives are affected by the crime of adultery — the aggrieved wives — if the adulterer is married, are not deemed to be necessary and interested parties in the trial or in its criminal consequences because woman as such in the eyes of the law is looked upon as an object, as inanimate property, whose rights are almost transferable. Property on its own has no legal existence. The analysis further leads us to say that sexual intercourse will not be treated as adultery if a married man has sexual intercourse with an unmarried woman because an unmarried woman does not belong to anybody as property and is not owned by anybody, but is just in the hands of her father or brother as trust. And they have no ownership rights to prosecute the person.

The intention of the legislature in framing this legislation was to act on the offences against the sanctity of the matrimonial home, but it failed to take into account that sanctity would be violated if either of the parties resort to adultery. As the law is blatantly biased against the woman, it puts the man in a privileged position and treats the relationship between husband and wife as one of owner and owned. The section is only meant to punish the adulterer because he has laid his hands on another man's property i.e. wife and tried to steal the same.

The undue bias in favour of the man can be inferred from the fact that an adulterous relationship indulged in with the permission or assistance of the husband is not punishable as adultery, again revealing the property syndrome of women. Correspondingly, the aggrieved wife was given no right to prosecute the husband's paramour and if a married woman is forced into adulterous intercourse by her husband, then she has no locus standi or status to prosecute either her husband or the other person involved in committing the offence of adultery.

Constitutional Validity of S. 497

The constitutional validity of S. 497 came under attack many a times, but the section has survived. The Supreme Court, upholding the validity of the section, rejected the argument of the wife that S. 497 affects discrimination between man and woman, as it confers on the husband the right to prosecute the adulterer and it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery. The court further held that the offence of adultery as defined in S. 497 is considered by the legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man as it generally is. The section provides expressly that the wife shall not be punishable even

as abettor. So, no grievance can then be made that the section does not allow the wife to prosecute the husband for adultery. The court also observed that merely because S. 497 does not take in cases where the husband has sexual relations with the unmarried woman, it would not become unconstitutional. An under inclusive definition is not necessarily discriminatory. The law, as it is, does not offend either Article 14 or 15 of the Constitution. The legislature is entitled to deal with the evil where it is felt and seen most, viz. a man seducing the wife of another.

Continuing in the same tone, the Supreme Court held [1985 (Supplementary) SCC 137] that the absence of hearing the woman, impleading her as a necessary party to the prosecution under S. 497 will not be violative of Article 21. Again, S. 497 came under challenge but the Supreme Court upheld its earlier view by observing that the denial of right to the wife to prosecute her husband guilty of adultery is not violative of Article 14 of the Constitution of India. In this case, the wife contended that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband and the provision which prescribes the same is unconstitutional on the ground of obnoxious discrimination. The wife in her petition had also challenged the constitutional validity of S. 198(2) Cr.P.C. by pleading that it confines the right to prosecute the adulterer to the aggrieved husband of the adulteress. The court observed that whether one does or does not subscribe to the wisdom or philosophy of these provisions is of little consequence. For, the court is not arbiter of the wisdom or the philosophy of law. It is the arbiter merely of the constitutionality of law. Upholding the validity of both the sections, the Supreme Court observed that both the sections go hand in hand and constitute a legislative packet to deal with the offence committed by an outsider to the matrimonial limit and the outsider is punished. While the outsider who violates the sanctity of the matrimonial home is punished, a rider has been added that if the outsider is a woman, she is not punished. There is, thus, reverse discrimination "in favour" of the woman rather than "against" her [1990 (1) HLR pg. 150].

Effect of Matrimonial Proceedings

The concept of adultery exercises a tremendous influence in civil and matrimonial proceedings between the husband and wife. Under the Parsi Marriage and Divorce Act, 1936, S. 32(d) provides that if either of the parties to the marriage are guilty of adultery or fornication, any of them can seek divorce. Ground (b) of the same section specifically lays down that if the wife at the time of marriage is pregnant by some person other than the husband, he can sue for divorce. Mr Dastoor Kotwal, one of seven high

priests of Parsis the world over, in his interview to a newspaper commented that any Parsi woman marrying outside her community will cease to be a Parsi and her act amounts to committing adultery. Children born out of such wedlock shall be treated as illegitimate. She will also be prohibited from entering the fire temple or other holy places, and debarred from participating in the social and religious ceremonies of the Parsis.

The sermons of the high priests confine adultery as an act between two persons only, while, generally three persons (husband, wife and adulterer) are required to complete the act of adultery. But, interestingly, a Parsi man marrying outside his community retains all his rights and privileges. Parsi Law further lays down that the wife shall not be entitled to any maintenance or an order of maintenance already made can be rescinded if she has not remained chaste or has committed adultery.

Hindu Marriage Act

Under the Hindu Marriage Act, 1955 S. 13(1)(i) provides for divorce, if after the solemnisation of the marriage, any of the parties commits adultery. But, for the purpose of proving the act of adultery, there must be proof beyond reasonable doubt and not merely by preponderance of evidence [1975 AIR Cal 243]. But the proof need not reach certainty but must carry a high degree of probability [AIR 1967 Mad 254]. Section 23(1)(b) of the Act further says that the court has to satisfy itself in a petition for divorce on the ground of adultery, whether the Petitioner is not an accessory, has connived or has not condoned the act. And if the court finds that there is any such thing, the claim for divorce fails. For the purpose of alimony under Ss. 24 and 25 of the Act, if the wife has not remained chaste, she can lose her alimony.

Under Muslim Law, the central idea about the Family Law is the institution of marriage or *Nikah*. Unlike under the Hindu Law, the marriage here is not a sacrament, but a civil contract. The Muslim male is not expected to observe monogamy and he can marry four women at a time. But, on the contrary, a Muslim wife is required to strictly observe monogamy. It is further provided that if a Muslim male commits adultery with a fifth woman and marries her, the marriage will only be irregular (*fasid*) and the same can be regularised by him by divorcing any one of his earlier wives.

A Muslim wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. If the charge is not proved, she will lose the ground for divorce. But, if on his own, the husband withdraws his imputation at or before the commencement of hearing, the wife shall be deprived of taking the same ground. It shows the cleverness

of the propounders of Muslim jurisprudence that once an allegation is levelled against a wife, legally speaking, it can be withdrawn by the husband to his favour. But, at the socio-cultural level, the stigma of adultery will always remain on the dignity of Muslim women.

Special Marriage Act

The Special Marriage Act, 1954 deals with marriages between persons belonging to different castes and religions. The marriages performed under the Act are known as civil marriages and no religious ceremonies are mandatorily required to be performed. Section 27(a) of this Act provides for a ground of divorce to both the parties on the ground of adultery. But, the wife will lose her right of maintenance if she is living an unchaste life or living in adultery.

Indian Divorce Act

Under the Indian Divorce Act, 1869 which governs the matrimonial disputes between the Christians, there is a provision under S. 10 which prescribes that any husband can seek divorce on the ground that his wife has since the solemnisation of marriage been guilty of adultery. On the other hand, the wife can seek divorce from the husband only if he is guilty of incestuous adultery, bigamy with adultery, marriage with another woman with adultery, adultery coupled with cruelty and adultery with desertion without reasonable cause for two years or upwards.

Further, the husband has only to prove simple adultery, but a wife has no right to seek divorce on the ground of only simple adultery, because she has to prove one more difficult situation along with adultery in order to get divorce.

The discrimination against women further goes under S. 11 of the Act which provides that the husband is not required to implead the adulterer as a co-respondent in the divorce proceedings, if she is leading the life of a prostitute or he does not know the name of the man with whom the adultery has been committed or the adulterer is dead. It is highly improbably for a man to say that his wife is guilty of adultery, but he does not know the name of the adulterer. This provision along with other ridiculous provisions form part of the outdated statute.

Section 34 of the Act further provides that the husband is entitled to claim damages from the adulterer on the issue of adultery and S. 35 says that if adultery is established in a petition for divorce by the husband, the court can order the co-respondent (adulterer) to pay the whole or any part of the cost of the proceedings on the issue of adultery. As per S. 7 of the Act, the court has to act on the principles of the English Divorce Law. In the

framing of this statute, when the Bill was brought into the legislature, the object was to place the matrimonial law administered by the court in India, on the same footing as the matrimonial law administered by the courts for divorce and matrimonial causes in England.

A single act of adultery by the Christian husband will not afford the wife the justification for living permanently away from him. Where the wife takes an uncompromising attitude and leaves the husband, he cannot be held to be guilty of constructive desertion [1953 (3) All ER 598]. In assessing the damages on the issue of adultery, the object is not to punish the adulterer but to provide for compensation for the loss which the husband has sustained [ILR 1947 FB Lah 867 and 1957 (1) All ER 63]. In the above case, the court laid down the following principles for assessing the damages:

a) the actual value of wife to the husband; b) the proper compensation for the husband; c) for the injury to his feelings, blow to his marital honour and serious hurt to his matrimonial and family life.

The amount spent on marriage is also a tangible basis for assessing the damages, but, if the husband condones his wife's adultery with the correspondent, he is not entitled to any damages [AIR 1937 Oudh 116].

The analysis of the relevant provisions, judgements and objects of the Act, brings us to the conclusion that there is a blatant discrimination against the woman on the issue of seeking divorce for adultery. The husband can claim compensation or damages due to loss caused to him by the adulterer as if she is a property; but, if the husband condones the act of adultery, only then is he deprived of his claim for damages. In all this, the woman has no say whatsoever in order to justify her conduct or situation.

Normally, a false allegation of adultery is also imputed against the wife in matrimonial proceedings, because it serves the interest of the husband by putting the wife on the defensive. In a divorce proceeding, if the husband takes the ground of adultery and produces false witnesses to prove the same, the wife will only be struggling to prevent the recording of the finding of fact on the issue of adultery against her.

The allegation of adultery against the wife is a multi-pronged weapon to scuttle her from pursuing disputes effectively. At a social level, once an allegation of the adultery against the wife is imputed, it is irrelevant whether it is proved or not, because the woman will invite a permanent stigma of being an adulterous women, which forces the wife to arrive at a settlement at the dictates of the husband.

Conclusion

In conclusion, after tearing off the mystical cover of Indian Law on the subject of adultery, it can be observed that adultery, proscribed, severely penalised, but irrepressible, becomes an unavoidable social institution alongside the institution of monogamy. The concept of adultery has been kept in the sphere of morality as well as law deliberately, in order to manipulate the sexuality of the woman to the advantage of man. The law on adultery is based on abstract individuality, equality and equivalence of the legal parties. It is treated by all the legal institutions including the Family, Criminal Law and the state on the model of the contract between individuals and its *quid pro quo*.

The law on adultery discriminates against women, whether it be under the criminal code or various codes which govern matrimonial disputes. It continues to treat a woman as a non-person and an object, giving her the status of property. The idea of equal status, identity and liberty should be fundamental to any democratic civilization. A law which forces the woman to live under a code imposed by man, totally negating the feminine viewpoint, is alien to truly humanistic values.

The law should be voluntary, informal and participatory, not coercive as it is in India. On the contrary, the guilt grounds for matrimonial relief should be discarded in favour of humanistic principles of incompatibility of temperament and breakdown of marriage in providing matrimonial relief. Anti-woman concepts such as adultery which operate predominantly in the spheres of law and morality, in the name of saving the institution of family, should be wiped out.

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Aruna Farswani

Cruelty as a Ground for Divorce

DIVORCE WAS NOT RECOGNISED by the general Hindu Law as administered by the courts of British India, unless it was allowed by custom. Today however, subject to the exception in cases where it is recognised by custom, divorce is entirely governed by statute.

There is a distinction made between grounds on which a decree of nullity of marriage can be passed and grounds on which dissolution of marriage may be decreed. The marriage having been duly solemnised and itself not being void or voidable, is dissolved by the court, for reasons mostly arising after the marriage. One of the grounds is the cruel treatment of one spouse by another. Cruelty as one of the important grounds for divorce has been defined differently in various Acts.

Parsi Law

S. 32(e) of the Parsi Marriage and Divorce Act, 1936 permits divorce if, "the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease, or where the defendant is the husband, has compelled the wife to submit herself to prostitution". Provided that divorce shall not be granted on this ground if the suit has been filed more than two years: (i) after the infliction of the grievous hurt or (ii) after the plaintiff came to know of the infection or (iii) after the last act of compulsory prostitution.

Grievous hurt as defined by S. 2(4) of the Act, means:

a. Emasculation;

b. Permanent privation of the sight of either eye;

c. Permanent privation of the hearing of either ear;

d. Privation of any member or joint;

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e. Destruction or permanent impairing of the powers of any member or joint;

f. Permanent disfiguration of the head or face or;

g. Any hurt which endangers life.

Indian Divorce Act

Section 10 of the Indian Divorce Act, 1869 states the various grounds on which the wife may file a petition for dissolution of marriage, one of them being adultery coupled with such cruelty as would without adultery have entitled her to a divorce "*mensa-et-toro.*"

Mensa-et-toro means from board and bed, in other words judicial separation. The marriage does not get dissolved but is suspended. In *R. Hemlata v/s. R. Satyanandan* [AIR 1979 AP 1], the wife was not entitled to dissolution of marriage merely on the ground of cruelty. Adultery or desertion or cruelty by itself is not an adequate ground for divorce. If the wife were to succeed in a decree for divorce against the husband she must show cruelty coupled with adultery.

Muslim Personal Law

Section 2(xiii) of the Dissolution of Muslim Marriages Act, 1939 states that a Muslim wife may obtain a decree for dissolution of her marriage, if the husband treats her with cruelty. That is to say he:

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; or

(b) associates with women of evil repute or leads an infamous life; or

(c) attempts to force her to lead an immoral life; or

(d) disposes off her property or prevents her exercising legal rights over it; or

(e) obstructs her in the observance of her religious profession or practice; or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

In *Asmabai v/s. Umer* [AIR 1941 Sind 23], the wife was forced to live away from her husband for about 12 years. On account of his ill-treatment, her life was being made miserable by reason of the fact that a return to her husband's house was out of question as it meant submission to conditions to which a self respecting woman could never agree. She was compelled to do without the society of her husband and could not marry any other person. She was forced to the degrading position of having to live with and

be a burden upon her parents. In the circumstances it was held that the husband was making her life miserable by cruelty of conduct within the meaning of S. 2(viii)(a).

Special Marriage Act

Under S. 27(d) of the Special Marriage Act, 1954 one of the grounds for divorce is that since the solemnisation of the marriage, the Respondent has "treated the Petitioner with cruelty". The Act has not defined cruelty. It has to be inferred from the whole facts, circumstances and atmosphere disclosed by the evidence. Actual intention on the part of one party to injure the other is an important factor though not an essential one.

In *A.P. Marry v/s. K.H. Raghavan* [AIR 1979 MP 40], it has been held that a single act of violence may come within the meaning of the words "has treated with cruelty", provided the violence is of a grievous and inexcusable nature.

Hindu Marriage Act

Under the Hindu Marriage Act, 1955 as it stood prior to its amendment in 1976, cruelty was not a ground for divorce, but was only a ground for judicial separation under S. 10(b)(1) in cases where the other party "has treated the Petitioner with such cruelty as to cause a reasonable apprehension that it will be harmful or injurious for the Petitioner to live with the other party". It was necessary for the Petitioner to prove that cruelty was of such character as to cause reasonable apprehension in the mind of the Petitioner that it will be harmful or injurious to live with the other party.

After the Amendment in 1976 of the Hindu Marriage Act, 1955 cruelty was made a ground for divorce by adding S. 13(i)(a) to the said Act which provides for the dissolution of the marriage in cases where the other party "has after the solemnisation of the marriage, treated the Petitioner with cruelty". The definition of cruelty has been given a very wide meaning and scope after the 1976 Amendment. It comprises two distinct elements. First the ill-treatment complained of; and second, the resultant danger or apprehension. The apprehension contemplated is that further cohabitation will be harmful or injurious and not that the same or similar acts of cruelty will be repeated.

What is cruel treatment must to a large extent be a mixed question of law and fact to be determined within the ambit of the marital relationship. No dogmatic answer can be expected to the variety of problems that continue to arise before the courts, since the law has no yardstick by which to measure the nature and degree of cruel treatment which may satisfy the test of apprehended harm or injury.

Physique, temperament, standard of living and culture of the spouses, and the interaction between them in their daily life and all other relevant circumstances have a bearing on the question as to whether the acts or conduct complained of, amount to cruelty which entitles a spouse to relief under this clause. It would be relevant to examine any physical or mental strain under which the spouse accused of cruelty may have been labouring. It is sometimes difficult to determine whether a number of minor acts of alleged physical violence are sufficient to amount to legal cruelty. This difficulty can be solved by keeping in view the physical and mental condition of the parties, their age, environments, standard of living or culture and status in life.

In judging the language, or the conduct of one spouse to another, allowance must be made for local and social habits. It is a well established principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties. The picture of domestic life of the spouses must be surveyed as a whole, before any judgement of their possible future relations and the reasonableness or otherwise of the apprehension in the mind of the Petitioner can be formed.

The Karnataka High Court has taken a practical and broad view in conformity with the recent trend and development of matrimonial law. The Court in *Srikant v/s. Anuradha* [AIR 1980 (Kar) 8] has observed that to define cruelty is to limit its application which is not advisable in as much as it is not at all possible to comprehend human conduct and behaviour for all times to come. Legal cruelty is not confined to causing physical acts of injury. There may be cruelty without any intention to injure. Thus, failure to comply with one of the essential obligations of marital life or any conduct of either spouse which causes disgrace to the other or subjects him or her to annoyance and indignity, amounts to legal cruelty.

Dastane v/s. Dastane

The leading case today on "cruelty" is *Dastane v/s. Dastane* [AIR 1975 SC 1534]. The facts of the case were as follows:

The husband and wife were married by an arranged marriage in 1956. Both of them were highly educated with high academic qualifications. There were three daughters born to the couple. From 1961, the differences between the parties were such that it became impossible for them to live together. The parties were very fond of writing letters to each other and this fondness grew to such an extent, that writing letters became the only form of communication between them.

From the letters and evidence it became apparent that the Respondent wife was guilty of cruelty to the husband. The acts of cruelty in this case

are innumerable. Only a few may be pointed out:

— the wife used to describe her mother-in-law as a boorish woman. She used to abuse her husband's ancestors on the day of *shradh*.

— when their child was sick and was suffering from high temperature of 104 degrees, she inspite of being the mother used to beat the child.

— she used to switch on the lights at midnight and sit by the husband's bedside, nagging him through the night. As a result he literally prostrated himself before her on several occasions.

These are but some of the facts of cruelty. The full bench (3 judges) judgement delivered by J. Chandrachud states:

"...similar outbursts were not the ordinary wear and tear of married life but they became, by their regularity a menace to the peace and well-being of the household, these were the acts which tend to destroy the legitimate ends and subjects of matrimony. Assuming that there was some justification for occasional sallies or show of temper, the pattern of behaviour which the Respondent generally adopted was grossly excessive. The conduct of the Respondents clearly amounts to cruelty within the meaning of S. 10(1)(b) of the Act. Under the provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the Petitioner that it will be harmful or injurious for him to live with the Respondent."

Going through this case of *Dastane v/s. Dastane* it is found that physical cruelty is not the only form of cruelty considered and that even mental cruelty is very important.

Mental Cruelty

A number of authorities have laid down various guidelines for ascertaining mental cruelty. Some of these are as follows:

1. Cruelty must be inferred from the whole facts and atmosphere disclosed by evidence.

2. Actual intention to injure the other spouse is an important but not an essential factor.

3. It is impossible to create categories of acts and conduct which amount to cruelty.

4. Sexual offences directly relevant to the husband's conjugal obligations may constitute ill-treatment of the wife.

5. Mental ill-treatment may be coupled with physical ill-treatment in order to found a charge of persistent cruelty.

6. Different forms of mental ill-treatment may be considered together in order to found a charge of persistent cruelty.

Handa v/s. Handa

One of the latest case for divorce on the ground of cruelty under the Hindu Marriage Act is that of *Asha Handa v/s Baldev Raj Handa* [AIR 1985 Delhi 76]. The facts of this case were as follows:

The marriage between the parties was solemnised on 21 March 1972. On 5 March 1981, the Petitioner (Asha) moved a petition for divorce against the Respondent (Baldev) on the grounds of cruelty and desertion. From 1973, the Respondent started forcing the Petitioner to hand over her entire salary to him. She would however be given only some petty amount for her day to day expenses, and with the passage of time no amount was given to her for personal expenses at all, including her maternity expenses and the expenses for medicines when their child was sick. The Respondent would return home late at night in a drunken state and would abuse, insult, hit and beat the wife and sometimes even threatened that she would be thrown out of the house.

The judgement states that the question whether the acts of the party charged were cruel will have to be answered in accordance with the ordinary sense of the word. So, while the court should pay regard to changing social conditions, they should be alert not to open the door too wide so that incompatibility of temperament and every defect of behaviour comes to be regarded as a ground for relief under the guise of cruelty. It is now well accepted that to constitute cruelty, the conduct complained of must be grave and weighty and every matrimonial conduct which may cause annoyance to or be resented by the other spouse does not amount to cruelty.

The facts of this case go well beyond the ordinary wear and tear of married life. It seemed that the Respondent did not think of anyone else but himself. It is possible that he did not intend to be cruel. Intention however is not an essential ingredient of cruelty and it is manifest that his intentional act did amount to cruelty.

Refusal to Prepare Tea

An interesting case is that of *Kalpana Srivastava v/s. Surendra Nath Srivastava* [AIR 1985 All 253].

In this case the wife refused to prepare tea for the friends of the husband, she lodged false reports of non-bailable offences against the husband and his relations, causing the husband and relations to rush to the court to obtain

bail in order to avoid arrest. She also got rid of her pregnancy without the consent of the husband. She was held guilty of cruelty.

In the judgement, His Lordship stated, "I am unable to accept that proved facts do not amount to cruelty under S. 13(1)(a) of the Act. Cruelty is not confined to physical cruelty, but includes mental cruelty. The matrimonial alliance is irretrievably broken where one of the spouses persistently causes mental torture, disgrace and harassment. The entire evidence on record and the totality of circumstances have to be considered for judging cruelty."

Having regard to the age of the parties, the environment, their standard of culture and status in life, it was held that the series of acts committed by the wife amounted to cruelty towards her husband.

Merely by showing that the parties are unhappy because of the unruly temper of a spouse in matrimonial wranglings falls considerably short of conduct which can amount by cruel treatment. It would not be sufficient to show that the other spouse is moody, whimsical, exacting, inconsiderate, etc. Defects of temperament must ordinarily be accepted, for better or worse. Therefore, although there may be unhappiness in a marriage, the court cannot for that reason alone find cruelty.

It is not possible to specify all the grounds of treatment or conduct which might constitute cruelty. In deciding whether the act, conduct, attitude, or behaviour of one spouse towards the other amounts to cruel treatment, the measure used is the resultant danger or apprehension of danger by the victim. The conduct alleged must be judged upto a point by reference to the victim's capacity or incapacity for endurance in so far as that ought to be known to the offending spouse. Therefore, a particular treatment in case of one person may amount to cruelty having regard to his temperament, physique and capacity to endure such treatment. Actual intention on the part of one spouse to injure the other is not an essential factor. Intentional acts may amount to cruelty even though the one who perpetrated the same had no intention of being cruel. But in doubtful cases, the state of mind of the offending spouse would be material, even crucial.

There is much case law on whether various acts or kinds of conduct amount to cruelty. Let us consider these.

Sex

In *Sheldon v/s. Sheldon* [(1966) 2 All ER 207 (CA)], Lord Denning held that persistent refusal or failure or neglect to have sexual intercourse may amount to cruelty. In *P v/s. P* [(1964) 3 All ER 919] it was held that the husband's abstinence for infrequent intervals of weeks and months

from sexual intercourse, attributed to absence of a desire for sexual intercourse, with any woman cannot itself constitute cruelty.

An attempt to commit sodomy or bestiality by the husband was held to amount to cruelty. This was so held in *Cooper v/s. Cooper* [(1954) 3 All ER 415, 426].

In *Gardner v/s. Gardner* [(1947) All ER 630], it was held that if the wife was a lesbian it amounted to cruelty.

Sexual malpractice by either spouse may amount to cruelty. This has been held in *Kusum Lata v/s. Kampta Prasad* [AIR 1965 All 250].

Birth Control

In *Forbes v/s. Forbes [1955 (2) All ER 311]* it was held that where a wife refuses to have children and insisted on the use of contraceptives knowing that her conduct was injuring her health and thereby injured her husband's health, or that there was reasonable apprehension of it amounted to cruelty. Where the husband refused to have children and insisted on the use of contraceptives, the hurt would be progressive, because the wife would be deprived of a child without her consent. This was held in *Bravery v/s. Bravery [(1954) 3 All ER 59 (CA)].*

Impotence

In *Sheldon v/s. Sheldon* [(1966) 2 All ER 257 (CA)], it was held that impotence by itself is not cruelty. It makes no difference whether it is physical or psychological. In *Madan Mohan Kohli v/s. Sarla Kohli* [AIR 1967 Punj 317] it was held that if there is a groundless charge of unchastity imputed to the wife it amounted to cruelty. In *Shanta Wadhwa v/s. Purshottam Mohandas Wadhwa* [1978 MLR 44 (Bom)] it was held that even were a husband to call his wife a prostitute it would amount to cruelty.

Drunkenness

The habit of drinking by itself cannot be characterised as cruelty unless it manifests itself in a manner which adversely affects the body and mind of the other spouse.

In *Smt Rita v/s. Brij Kishore Gandhi,* Justice J.M.L. Jain stated, "No doubt drinking is a constituent of culture all over the world, and is almost a cult in certain societies. Yet a habit of excessive drinking is a vice and cannot be considered as reasonable wear and tear of married life. No reasonable person marries to endure habitual drunkenness. Although, it is not an independent ground of any matrimonial relief in India, it may constitute cruelty, if indulged in by a spouse and continued inspite of

remonstrances by the other. It may cause great anguish and distress to the wife who never suspected what she was bargaining for and may sooner or later find living together not only miserable but unbearable. If it was so, she may leave him and may, apart from cruelty, even complain of constructive desertion or wilful neglect by the husband."

Thus it is seen that when drunkenness reaches a point where it causes harm or injury to the other spouse it is tantamount to cruelty. The fact that the wife suffers from epilepsy does not constitute cruelty to the husband as it cannot be said that it causes reasonable apprehension in the mind of the husband that it would be harmful or injurious for him to live with her. *Raghunath v/s. Vijaya* [AIR (1972) Bom 132].

It is very interesting to note that a wife questioning her husband as to his coming late, and complaining to the police station, which may embarrass a husband, by itself is not cruelty [*Gorachand v/s. Dipala* (1983) 2 DMC 7; (1983) L Cal LJ 411]. But at the same time we see in a Delhi case, that making a false complaint to the police leading to the arrest of the husband was held to be cruelty by the wife [*Suresh Bala v/s. Major G.S.Bala*, (1983) 1 DMC 45].

There is one interesting judgement by the Bombay High Court in *P. v/s. P* [AIR 1982 Bom 498] where the Respondent wife was found in a hotel cabin with her blouse and brassiere unhooked and Co-respondent holding her breasts. The Bombay High Court held that this incident did not upset the Petitioner husband's health to any extent and the court refused to accept that this conduct on the part of the Respondent amounted to cruelty to the Petitioner!

In a recent judgement reported in AIR 1984 Delhi 291, the court has held that continued cohabitation is no evidence of condonation, that is of forgetting and forgiving. A continual cohabitation inspite of cruel treatment is not unknown and many women allow themselves to be subjected to this humiliation much against their will and sometimes in the hope of improvement and prefer silence to exposure in order to avoid likely distress to the parents and acquaintances.

(From, *The Lawyers*, May 1988).

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Heera Nawaz

Cruelty — Law and Women

IT SEEMS STRANGE that "cruelty" has not been defined by statute. As the Royal Commission (1956) observed, "we consider that it is preferable to allow the concept of cruelty to remain open..." This may be because the concept of cruelty varies with different classes of people.

Cruelty depends and varies according to the nature of the case, the backgrounds and disposition of the parties which are assessed by judges according to the versions of witnesses and evidence of parties. Moreover, matrimonial cases are delicate, sensitive issues where no two parties are alike, making each individual case unique. What constitutes cruelty in one particular case may not in another case, where the person may be of a stronger constitution and mental makeup. In short, cruelty cannot be assessed by any particular yardstick.

While acts of cruelty are infinitely variable, differing according to different cultural levels and social norms, a prospective litigant should be aware of the concept of "legal cruelty".

Legal Cruelty

To constitute legal cruelty, there must be danger to life or injury to health, physical or mental, or a reasonable apprehension of it. Stray incidents of violence do not constitute legal cruelty, but if the cumulative or sum total of the violence towards the spouse affects his or her health, then this can be said to constitute legal cruelty. "The irony of the situation", says Ms Prem Kumari, Advocate, who handles divorce cases at the Family Court, Bangalore "is that unless the spouse can provide evidence to show that her health has been affected due to the cruelty, she will not get relief. The situation is compounded by the fact that 'hearsay evidence' does not constitute evidence and because of the lack of sufficient evidence, several women with genuine woes do not get justice."

In contrast, it is easier for women to prove mere "moral cruelty", which could include false accusations, rudeness, incivility, drunkenness etc., which are totally unjust in themselves, but which do not constitute legal cruelty, as the spouse's health may not have suffered on account of it.

Within the ambit of legal cruelty arises the concept of physical and mental cruelty, which though easy to comprehend, may be difficult to assign and pinpoint in complicated cases. While physical cruelty is comparatively easier to prove by evidence such as letters, medical treatment certificates, etc., it is the concept of "mental cruelty" that is difficult to prove.

B.P. Hari in his book, *Marriage and Divorce in India*, states that cruelty must be inferred from the whole facts and atmosphere enclosed by the evidence and that different forms of mental cruelty may be taken together in order to found a charge of "persistent cruelty".

Hence a man may be cruel to his wife at one point of time by which his wife has not been unduly affected as this could constitute the ups and downs of everyday living; but when the husband persists in these acts due to which their relationship deteriorates and by which living with him becomes an impossibility, it is time for the wife to act.

Example: When a husband began fraudulently converting cheques and was adjudicated as an insolvent and convicted of larceny and when despite repeated promises to turn over a new leaf he did not do so, it was held to be a case of mental cruelty.

Mental Cruelty

Cases depicting mental cruelty can be of various kinds and include all forms of cruelty which are not physical cruelty, either directly or indirectly. The following is an interesting case of mental cruelty, which came before the Family Court.

A, a young woman married an old widower, B, who had a son by his first wife. The old man suspected his wife's fidelity, assuming she had affairs with younger men. Hence in order to test her, he underwent sterilisation, alluding that in the eventuality of her getting pregnant, it would prove her being unfaithful to him. The innocent woman, who had never had any affairs and who had been faithful to this man in spite of his old age, was in a dilemma as (due to her husband's sterilisation), she would be unable to give birth to a son and being a staunch Hindu, she had placed this high in her priorities in life. It was held to be a case of mental cruelty.

But what is essential to remember in a charge of mental cruelty is that according to law books on the subject, the actual intention to injure the

other spouses is not an essential fact, as the following case, known as *Gollin's* case, illustrates.

The parties were married in 1946 and two daughters were born to them in 1947 and 1949 respectively. The husband being incorrigibly lazy, ran into debt, sold his farm and bought a house on mortgage. In order to make ends meet, his wife ran this house as a guest house. Although the wife was struggling, there was no evidence to show that he wished to harm his wife physically or that he was even aggressively unkind to her. But under all these burdens, she was reduced to such a state that she was unable to maintain herself and her children. She finally complained of "persistent cruelty" and her plea was accepted, proving that cruelty need not necessarily be "intentional" to get a divorce in a matrimonial suit.

Main Ground of Divorce

Similar cases have appeared before the Family Courts where couples wish to dissolve their marriages. It is not surprising that cruelty is the main ground for divorce for the majority of cases, though adultery is also a major ground. People from all strata of society are found at the Family Court.

Ms Gitadevi Nagappa, Judge of the Family Court quells the rumour that only certain communities or people belonging to certain age groups are more prone to cruelty than others. She remarks: "I have handled cases of almost all communities and age groups and one cannot make sweeping statements that certain communities tend to inflict more cruelty on their spouses. Each particular case depends on the individual and is unique in the sense that there may be so many factors at work, which causes him/her to inflict cruelty. Each case must be judged according to its merits, without harbouring preconceived notions."

But while marriages are made in heaven, they are dissolved in the Family Court, which all said and done is not the pleasantest place to visit. Ms Nagappa herself remarks, "Not a day passes without my witnessing women in tears or their children crying." Indeed, with statistics indicating the rise of divorce cases, the innocent children seem to be the hardest hit and affected by acts of cruelty.

On the other hand however, with the birth of children, couples usually try to preserve their marital status. They usually opt for divorce only in "extreme" circumstances when all previous legal measures such as restitution of conjugal rights and counselling by experts fail. While there is no readymade formula to enable marriages to last, it seems a pity when the very sacred tie is broken because of cruelty, especially within one or two years of marriage.

However, though divorces are never pleasant experiences, they seem preferable to marriages, which have lost all sacredness due to persistent batterings. According to the Hindu Marriage Act, 1955, the Special Marriage Act, 1954 as well as according to Muslim Law, legal cruelty is a ground for divorce. Parsi Law is silent over cruelty as a ground for divorce. Christian women have to prove cruelty to get a judicial separation, but have additionally to prove adultery to get a divorce.

If things have reached a point of no return, it seems a termination of the marriage in time could prevent dowry death or extreme harassment. It would also give the spouse a chance to start a fresh life free from cruelty and the unhappiness and harm it entails. We should strive for a society where women live along with men harmoniously without discrimination and cruelty.

(From, *The Lawyers*, March 1989).

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Anuradha Bindra

The Changing Concept of Mental Cruelty

THE HINDU MARRIAGE ACT introduced the concept of divorce under certain circumstances. These revolved around the fault theory of divorce which is based on the hypothesis that one party is guilty of a matrimonial offence and the other is innocent. "Cruelty" plays a major role in the fault theory. Cruelty is a ground for divorce and is one of the commonest grounds on which petitions for divorce are filed. It may be worth examining the changing concept of cruelty in light of the recent Supreme Court judgement in *Bhagat v/s. Bhagat* [JT 1993 (6) 429].

B v/s. B

In the said case the facts were as follows: The Petitioner was an advocate of Delhi High Court and Supreme Court. The Respondent wife was working in a public sector corporation. The Petitioner and Respondent were married in 1966, they have two children. The Petitioner had been trying to obtain a divorce from the Respondent from 1980. He tried for five years to get a divorce by way of mutual consent. but the wife refused to co-operate. He then filed for divorce on the ground of adultery. The wife in her counter denied the allegation and stated that he was highly suspicious and used to hallucinate. The parties had been litigating for eight years and the matter had been heard by five judges, but it still remained at the stage of recording evidence. The Petitioner amended the petition and alleged that the averments in the plaint *per se* amounted to mental cruelty, which entitled him to get a divorce without going into the question of adultery.

The Supreme Court, in an application for speedy disposal of the case, granted the divorce. The court said they had three options available to them:

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to either dispose the case, or grant speedy disposal, or decide the case, and of these they chose the last option. The court defined mental cruelty as conduct of such a nature that the parties cannot reasonably be expected to live together. The court granted divorce on grounds of mental cruelty holding that the wife's averments in the pleadings amounted to mental cruelty. The court held that it is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together or living together again. Therefore, having regard to the peculiar features of this case, the court was of the opinion that the marriage between the parties should be dissolved under S. 13(1) (ia) of the HMA. In doing so the court has virtually permitted divorce on the ground of "irretrievable breakdown of marriage" even though this is not a ground for divorce under the Hindu Marriage Act. By liberally interpreting "cruelty" the court has virtually departed from the fault theory of divorce.

Theories of Divorce

There are three theories of divorce viz. the fault theory, the mutual consent theory and the breakdown theory. In the fault theory, which is the traditional theory of divorce, one of the parties to the marriage after solemnisation of marriage has to prove that the other committed a matrimonial offence. This matrimonial offence has to be recognised as a ground for divorce in law for dissolution of marriage to take place. The dichotomy of guilt and innocence is the basic requirement of this theory. The mutual consent theory presumes that marriage is a contract based on the mutual consent of the parties. Therefore a marriage should be dissoluble by mutual consent of the parties without showing any cause. The breakdown theory states that if a marriage has broken down beyond any possibility of repair, then it should be terminated without looking at causes or without fixing responsibility on either spouse. This last mentioned theory has not yet been accepted in our divorce laws.

The Hindu Marriage Act recognises divorce based on the first two theories of divorce i.e. fault and mutual consent. Section 13 takes into account the fault theory of divorce and S. 13(1A) frustration in marriage caused by insanity, conversion, disease, renunciation of the world. Section 13B takes into account the mutual consent theory. The HMA does not take into account the breakdown theory and "irretrievable breakdown" is not a ground for divorce. In *Ashok Kumar v/s. Shabnam* [AIR 1989 Delhi 121] the court held that irretrievable breakdown of marriage is not contemplated to be one of the grounds for dissolution of marriage in the scheme of the HMA, and it cannot be taken as a ground for decree of dissolution of marriage. In *Nitu v/s. Krishna Lal* [AIR 1990 Delhi 1] the court reiterated

the observation of the Delhi High Court in the *Ashok Kumar v/s. Shabnam* case on irretrievable breakdown not being a ground for divorce under the Act.

Concept of Cruelty Under Hindu Marriage Act

"Cruelty" has not been defined under the Act. Blacks Law Dictionary defines "cruelty" as "the intentional and malicious infliction of physical suffering upon living creatures particularly human beings or, as applied to the latter the wanton, malicious and unnecessary infliction of pain upon the body or the feelings and emotions". In India, cruelty has been defined in the Indian Penal Code in the explanation to S. 498A as "any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman where such harassment is with a view to coercing her, or any person related to her, to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand". The only Act in which cruelty as a marital offence is defined in the Muslim Marriages Act, 1939. Section 2 (viii) of this Act states that the husband treats her with cruelty, that is to say:

a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment, or b) associates with women of evil repute or leads an infamous life, or c) attempts to force her to lead an immoral life, or d) disposes of her property or prevents her exercising her legal rights over it, or e) obstructs her in the observance of her religious profession or practice, or f) if he has more wives than one and does not treat her equitably in accordance with the injunctions of the Quran.

Cruelty is either physical or mental. Before the 1976 Amendment Act, cruelty under the Hindu Marriage Act was only a ground for judicial separation and not a ground for divorce. Prior to the amendment, cruelty was defined as such conduct which would cause reasonable apprehension in the mind of the Petitioner that it would be harmful or injurious for the Petitioner to live with the Respondent. In *Dastane v/s. Dastane* [AIR 1975 SC 1534] the court held that cruelty as defined prior to the amendment included within its purview harm or injury to a person's health, reputation etc. These would be important considerations for determining whether the conduct of the Respondent amounts to cruelty, but this conduct must be of such a nature as to cause a reasonable apprehension in his/her mind that it would be injurious or harmful for the Petitioner to live with the Respondent.

The 52nd Law Commission Report recommended that "cruelty" be

made a ground for both divorce and judicial separation. The amendment removed the requirement of reasonable apprehension of injury or harm to the Petitioner if he or she continued to live with the Respondent. The amended provision states that a person can petition for divorce if the Respondent, after solemnisation of marriage, has treated the Petitioner with cruelty. The amended provision has liberalised the concept of cruelty. The Petitioner no longer has to prove that the cruel treatment was or is of such a nature that it would cause a reasonable apprehension in his/her mind that it would be harmful or injurious for the person to live with the Respondent.

Though the provision of cruelty was liberalised by the 1976 amendment, the Supreme Court in *Shoba Rani v/s. Madhukar Reddi* [1988 (1) SCC 105] defined "cruelty" as conduct in relation to human conduct or behaviour. It is a conduct in relation to, or in respect of, matrimonial duties and obligations. It is the course of conduct of one which is adversely affecting the other. Cruelty may be mental or physical or intentional or unintentional. If it is mental cruelty, we first have to inquire into the nature of the cruelty and the impact of such treatment on the mind of the spouse whether it caused reasonable apprehension that it would be injurious or harmful to live with the other. This inference has to be drawn by taking into account the nature of the conduct and its effects on the complaining spouse. The cruelty alleged would largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon the cultural and human values to which they attach importance.

Therefore, though S. 13 was amended and the need to prove reasonable apprehension of harm or injury by the Petitioner was no longer necessary, the court till *Shobha Rani's* case still referred to the standard laid down in *Dastane v/s. Dastane*. The personality, culture and life style of the Petitioner are relevant in determining whether the alleged acts amounted to cruelty.

In *B v/s. B,* [JT 1993 (6) 429] the Supreme Court speaking through Justice B.P. Jeevan Reddy stated that "mental cruelty" in S. 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it impossible to live with the other. In other words, "mental cruelty must be of such a nature that parties cannot reasonably be expected to live together". Thus it is no longer necessary to prove reasonable apprehension of mental or physical harm or injury. The court stated that although irretrievable breakdown of marriage is not a ground for divorce by itself, in this case the marriage of the parties had broken down irretrievably and there was no chance of their coming together

or living together. The court said that with regard to the peculiar features of this case, the marriage between the parties should be dissolved under S. 13(l)(ia) of the Hindu Marriage Act. The court held that the averments made by the wife in the written statement, to the effect that the husband needed psychiatric help and was hallucinating, were sufficient to constitute mental cruelty.

Critique of *B v/s. B*

As stated earlier, "breakdown of marriage" is not a ground for divorce in India. The Supreme Court in *B v/s. B* stated that irretrievable breakdown of marriage is not a ground for divorce, but stated that the marriage between the parties had broken down irretrievably and there is no chance of reconciliation or their living together. In *Reynold Rajamani v/s. Union of India* [AIR 1982 SC 1261] the court held that when an Act specifically sets out the grounds under which a marriage can be dissolved, additional grounds cannot be included by judicial construction. In *B v/s. B*, the court through judicial ingeniousness defined "mental cruelty" in such a manner that it actually included within its purview "irretrievable breakdown of marriage". The definition of mental cruelty given by the court is the same as that in the Matrimonial Causes Act of 1983 in the United Kingdom which defines "irretrievable breakdown" of marriage under S. 1(b) i.e. "that the Respondent has behaved in such a manner that the Petitioner cannot reasonably be expected to live with the Respondent". This ground of divorce i.e. irretrievable breakdown, in the United Kingdom includes within its purview the concept of cruelty. But the Supreme Court definition of mental cruelty in *B v/s. B* includes within its purview irretrievable breakdown of marriage.

The concept of irretrievable breakdown was discussed in the 71st Law Commission Report in 1978 (*see appendix to this article on p. 156*) The Commission recommended irretrievable breakdown of marriage as a ground for divorce. The report stated that irretrievable breakdown of marriage as visualised by them would not make it necessary for the court to go into the question as to which party was at fault before granting a decree of divorce, and it would be enough to prove that the relationship between husband and wife had reached such a breaking point that there is no possibility of reconciliation.

The Commission laid down safeguards for the ground to be used viz. provision for reconciliation under S. 23(2) HMA, provision restricting divorce within certain period after 5 years after marriage, provision for welfare of children and permitting court to refuse divorce in case of hardship to the Respondent.

The Supreme Court in *Bhagat v/s. Bhagat* in expanding the concept of mental cruelty to in fact include the ground of breakdown of marriage, is confusing two different theories of divorce. Also they have incorporated the concept of breakdown of marriage without any safeguards as envisaged by the Commission Report (see Box for draft of Commission Report).

While introducing "irretrievable breakdown" as a ground for divorce may be welcome, this has to be accompanied by safeguards for women who are often in an economically weaker position. Women's organisations have resisted the introduction of such a ground in the absence of a Community of Property Law.

In the absence of a law which grants women equal rights in their husband's property acquired during the marriage, this liberalised definition of cruelty can be misused by men anxious to discard their wives without making adequate provision for their divorced wives and children. The proposed Bill at least had certain safeguards which are absent under existing law. The decision in *B v/s. B* makes it necessary to reform the divorce law to protect the rights of women.

(From, *The Lawyers*, March 1994)

Appendix 1

71st Law Commission Report

Recommended Amendments:

8.1. The following is a rough draft of the new sections to be inserted in the Hindu Marriage Act, 1955, in order to implement our recommendations on several matters of a substantive nature dealt with in this report so far:

13C. (1) A petition for the dissolution of a marriage by a decree of divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.

(2) The court hearing such a petition shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

(3) If the court is satisfied, on the evidence, as to the fact mentioned in subsection (2), then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to the provisions of this Act, grant a decree of divorce.

(4) In considering for the purpose of subsection (2) whether the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding three months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period for which the parties to the marriage lived apart.

(5) For the purpose of subsections (2) and (4), a husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.

13D. (1) Where the wife is the Respondent to a petition for the dissolution of a marriage by a decree of divorce under S. 13C, she may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial hardship to her and that it would in all the circumstances be wrong to dissolve the marriage.

(2) Where the grant of a decree is opposed by virtue of this section, then —

(a) if the court finds that the Petitioner is entitled to rely on the ground set out in S. 13C, and

(b) if apart from this section, the court would grant a decree on the petition.

This court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if the court is of the opinion that the dissolution of the marriage will result in grave financial hardship to the Respondent and that it would in all the circumstances he wrong to dissolve the marriage, it shall dismiss the petition, or in an appropriate case stay the proceedings until arrangements have been made to its satisfaction to eliminate the hardship.

13E. (1) The court shall not pass a decree of divorce under S. 13C unless the court is satisfied that adequate provision for the maintenance of children born out of the marriage referred to in subsection (2) has been made consistent with the financial capacity of the parties to the marriage.

(2) This section shall apply to —

(a) minor children;

(b) unmarried or widowed daughters who have not the financial resources to support themselves; and

(c} children who, because of special condition of their physical or mental health, need looking after and have not the financial resources to support themselves.

8.2 in view of the proposed insertion of a new section, it will also be necessary to make consequential changes in S. 21A(1), clause (a) and (b).

Section 21A, subsection (1) and subsection (2) read as follows:

21A(1) where —

(a) a petition under this Act has been presented to a District Court having jurisdiction by a party to a marriage praying for a decree for judicial separation under S. 10 or for a decree of divorce under S. 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under S. 10 or for a decree of divorce under S. 13 on any ground, whether in the same District Court or in a different District Court, in the same state or in a different state.

The petitions shall be dealt with as specified in subsection (2).

(2) In a case where subsection (1) applies —

(a) If the petitions are presented to the same District Court, both the petitions shall be tried and heard together by that District Court;

(b) If the petitions are presented to different District Courts, the petition prescribed later shall be transferred to the District Court in which the earlier petition was presented and both the petitions shall be heard and disposed

of together by the District Court, in which the earlier petition was presented.

In subsection (1) clause (a) and clause (b), newly added S. 13C should find a mention. In clause (a), after the word and figure "S. 13", the words, figure and letter "or S. 13C", should be inserted. In clause (b), after the word and figure "S. 13", the words, figure and letter "or S. 13C" should be inserted.

8.3. Attention may also be drawn to S. 23(1)(a) of the Hindu Marriage Act which related to decree in the proceedings. Section 23(1)(a), in so far as material, reads as follows:

23(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that —

(a) any of the grounds for granting relief exists and the Petitioner (except in cases where the relief is sought by him on the ground specified in subclause (a), subclause (b) or subclause (c) of clause (ii) of S. 5) is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief and...then and in such a case, but not otherwise, the court shall decree such relief accordingly.

In our opinion, it is desirable that the petition under the new S. 13C would be excluded from the scope of S. 23(1)(a). Once divorce is decided to be granted on the basis of irretrievable breakdown of the marriage, any allegation that the fault of a party contributed to the conditions leading to the breakdown should be regarded as irrelevant. To allow S. 23(1)(a) to operate in all its severity in such cases might defeat the object of the recommended amendment. The general and categorical prohibition contained in S. 23(1)(a) would thus be inappropriate in the case of irretrievable breakdown.

Accordingly, we recommend that in S. 23(1)(a) after the word and figure "S. 5", the words figure and letter "and except in cases where the petition is presented under S. 13C" should be inserted. The added matter will, of course, appear before the closing rectangular bracket in S. 23(1)(a).

Sd/-
H.R. Khanna
Chairman

Sd/-
P.M. Bakshi
Member Secretary

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P.M. Bakshi

Mental Abnormality and Marriage Law

ONE OF THE TOPICS arising occasionally in matrimonial law relates to the mental abnormality of either spouse. Does this abnormality affect the validity or continuance of the marriage? If so, what should be the nature and intensity of such abnormality? Can a person with a subnormal mind be prevented from marrying? Can such a person be compulsorily sterilised, in order to prevent the possibility of the birth of children who may be a burden on such a person and on society? These are some of the social and legal issues of importance that have arisen in this sphere.

Nullity of Marriage (Initial Abnormality)

Abnormality of the mind may be initial, or it may be supervening, i.e. arising after the marriage. Under S. 5(ii) of the Hindu Marriage Act read with S. 12(1)(b) of the same act (as amended in 1976), a marriage can be declared to be void if, at the time of the marriage, either party:

"(a) is incapable of giving a valid consent to marriage in consequence of unsoundness of mind; or

"(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

"(c) has been subject to recurrent attacks of insanity 'or epilepsy'."

A marriage violating the above requirement can be annulled by a decree of nullity to be passed by the competent court on a petition filed for the purpose.

The situation of pre-marriage abnormality is taken care of by the above provision.

Post-Marriage Abnormality

A decree of nullity of marriage covers pre-marriage mental abnormality, provided it is of the requisite quality. Where the abnormality arose after marriage, the proper relief is divorce. Under S. 13(1)(iii) of the Hindu Marriage Act (as amended in 1976), a spouse can petition for divorce, on the ground that the other spouse:

"(iii) has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the Petitioner cannot reasonably be expected to live with the Respondent."

An explanation to the above clause provides that "mental disorder" means the following: (1) mental illness; (2) arrested or incomplete development of mind; (3) psychopathic disorder, or (4) any other disorder or disability of mind and includes (5) schizophrenia.

The expression "psychopathic disorder" (which is a species of mental disorder) is itself defined as meaning a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct (on the part of the party against whom relief is sought) and whether or not it requires or is susceptible to medical treatment.

Such mental disorder as is mentioned in S. 13(1)(iii) of the Hindu Marriage Act (referred to above) is a ground of divorce.

Rationale for Grant of Relief

The rationale of treating mental abnormality as a ground for seeking a decree of nullity of marriage is the assumption by the legislature, that if it is a pre-marriage abnormality, it would most probably affect the validity of the consent given to the marriage by the abnormal party. Besides this, the normal party (i.e. the other party) would not have given his or her consent to the marriage if the facts were fully known.

Post-1976 Law as to Fraud

The second aspect just now mentioned, namely, the proposition that the normal party would not have consented if the facts were known, takes one to the topic of fraud. It should be pointed out that under S. 12(1)(c) of the Hindu Marriage Act (as amended), the fact that a party's consent was obtained by force or by fraud as to "the nature of the ceremony or as to any material fact or circumstance concerning the Respondent" (i.e. concerning the opposite party) is itself a ground for seeking a decree of nullity of marriage, provided the proceedings are instituted within one year of

discovery of the fraud and the Petitioner has not lived with the opposite party as husband and wife after discovery of the fraud. Relief on the ground of fraud is justified on an elementary principle. The relationship of marriage depends, for its stability and happiness, on full faith and disclosure between the parties. If such a disclosure has not been made, a serious breach of duty can be taken to have occurred.

Where mental abnormality is a ground for divorce, the rationale is somewhat different. Married life may become difficult if one spouse is suffering from mental abnormality of such a nature that the spouses cannot reasonably be expected to live together. Where the mind is abnormal it can neither communicate, nor can it be communicated with. The essence of marriage is the sharing of thoughts and feelings which in this case, becomes impossible.

Fraud: Pre-1976 Position

Before 1976, fraud was mentioned as a ground of nullity in the Hindu Marriage Act. But it was not particularised. The contractual concept of fraud as covering the active concealment of fact and "any other act fitted to deceive" (S. 17, Contract Act), was not applied in matrimonial law. Thus, in a Madhya Pradesh case [*Madhusudan v/s. Chandrika* AIR 1975 MP 174], the husband sought a decree of annulment of marriage on the ground that the wife had been suffering from (curable) syphilis before marriage, but had concealed that fact from the husband. However, the court rejected the husband's prayer for decree of nullity on the ground that fraud as a basis for nullity of marriage must be as to the nature of the ceremonies or as to the very identity of the other party, e.g. fraud by which a girl who had seen A as her prospective husband is got married to B, by practising deception on the girl.

The position may be different if the disease is incurable. Thus, in a case between Christians, decided under S. 19 of the Indian Divorce Act [*Hirendra Kumar Biswas v/s. Hemlata* ILR (1921) Cal 283], the husband sued for nullity of marriage on the twin grounds of impotency and fraud. The fraud alleged was that the wife was suffering from incurable syphilis, which had been concealed from the husband. The marriage had not been consummated. The court remanded the case for further investigation, but annulment of marriage was regarded as permissible in the circumstances of the case, since the possibility of cure of the disease was very remote.

Mental Abnormality: Pre-1976 Position

In a Calcutta case decided before 1976 [*Kartik Chandra v/s. Manijurani* AIR 1973 Cal 545], the husband alleged fraud by the wife on the

ground of her lunacy. But the husband lost the case for want of proof. It was held that a wife's unusual or abnormal behaviour during the two or three days she was in her husband's house, could not be termed as "lunacy", especially in view of the fact that just a few weeks before the marriage, the wife had appeared for the school final examination.

As regards the initial lunacy of a spouse, the provision in the Hindu Marriage Act before 1976 was that the marriage could be avoided, if the opposite party was an "idiot" or a "lunatic" at the time of marriage. These words were not defined in the Act and, in construing them, recourse was generally had to S. 3(5) of the Indian Lunacy Act, 1912. It had been held before 1976, that where a party had, before marriage, suffered from an occasional mental derangement, but was all right at the time of marriage, there could be no decree of annulment [*Munishwar Date v/s. Indra Kumari* AIR 1963 Punj 449]. The crucial date was that of marriage. This was also the pre-1976 interpretation of the provision in the Special Marriage Act [*Solomon v/s. Josephine* AIR 1959 Mad 151].

Epilepsy

On the specific question as to epilepsy as a ground of nullity of marriage under the Hindu Marriage Act, a few observations are in order. There is a pre-1976 case of (alleged) pre-marriage epilepsy of a spouse [*Raghunath v/s. Vijaya* ILR (1971) Bom 511, AIR 1972 Bom 132]. The husband was seeking annulment of the marriage, pleading fraud in the shape of non-disclosure by the wife of her epilepsy. Refusing relief, the Bombay High Court laid great emphasis on the fact that the epileptic condition from which the wife was suffering was curable, hence representation that the wife was healthy did not amount to fraud.

In the above case, another fact that went against the husband was that he had lived with the opposite party as husband and wife even after discovery of the fraud and had thus condoned the alleged flaw in consent to the marriage.

Recurrent attacks of insanity or epilepsy preceding the marriage constitute one of the grounds of obtaining a decree of nullity under S. 5(ii) of the Hindu Marriage Act as amended. This provision in the Hindu Marriage Act, S. 5(ii) (along with the other grounds appearing in that clause) takes the place of the pre-1976 text of the clause. Before 1976, "lunacy or idiocy at the time of the marriage" stood as the relevant ground of nullity of marriage [See *Raghunath v/s. Vijaya* AIR 1972 Bom 132]. The object of the legislature, in substituting a more elaborate provision in the Hindu Marriage Act, was to define more precisely the circumstances under which mental abnormality may be raised as a ground of attack on the

validity of a marriage. It is believed that the provision gives a much more precise picture than the pre-1976 language.

Whether epilepsy is a symptom of a disease or whether it is a disease in itself, does not appear to be very material in the present context, because, from the social point of view, it is a physical condition (original or derivative), which does lead to marital unhappiness.

In this context, it may be proper to mention that in the law of torts and accident compensation, there have been cases where epileptic tendencies induced by the trauma of an accident or accelerated by the trauma of an accident have been specifically regarded as a head of damages in assessing compensation [*Joyce v/s. Yeoman* 1981 (1) WAR 549 (CA); Arnold Mann, Medical Assessment of Injuries for Legal Purposes (1985) (Butterworth), chapter 4].

Schizophrenia

After 1976, the provision in the Hindu Marriage Act as to fraud has been made more particularised (as stated above) by providing, inter alia, for relief if the fraud is as to any "material fact or circumstance concerning the Respondent".

After the amendment a case of mental abnormality arose in 1981 before the Delhi High Court [*Asha Srivastava* AIR 1981 Delhi 253]. The wife had been suffering from schizophrenia before marriage, but the fact was concealed from the husband. After the marriage, the husband found that the wife was behaving curiously. It was learnt that even before marriage, the wife had to take medical treatment in the G.D. Pant Hospital, Delhi. She had hallucinations as to places and persons, was not aware of the movement of time and appeared to be withdrawn. At times, she became very angry and restless and lost her sleep and appetite. All these facts were known before marriage. Diagnosis of schizophrenia had been made six years before the marriage.

The husband's petition was filed within three and a half months of the marriage, because it was found that the woman was mentally disordered and showed abnormal behaviour, such as not responding to greetings, tearing off one's clothes, breaking crockery in the house and the like. The husband's prayer for declaration of nullity was granted. The Delhi High Court pointed out that the wife's disease was incurable, though the wife had short spells during which she would behave normally. According to the expert medical opinion produced in the case, the wife's disease (schizophrenia) was incurable, an aspect greatly emphasised by the court.

Divorce and Insanity

Divorce sought by the wife against the husband on the ground of the husband's insanity had figured occasionally before the courts in India. In a Punjab case, the wife was successful (*Shanti Devi v/s. Ram Nath* AIR 1982 P&H 270]. The question arose in a Gujarat case also [*Sipinchandra v/s. Madhuriben* AIR 1963 Guj 280]. The ultimate result is not clear from the judgement. But the case is of interest on a point of procedure. The High Court held that the court has no power to order medical examination of a spouse who is unwilling to undergo it [*Revonna v/s. Shantappa* AIR 1982 Mys 157].

Mere mental weakness of a spouse is not equated with idiocy or insanity, for the purpose of matrimonial law i.e. under the Hindu Marriage Act as it stood before 1976 [*A.S. Mehta v/s. Vasumati* AIR 1969 Guj 48]. But the court may give relief, if it is proved that the Respondent is unable to manage his or her affairs [AIR 1972 Delhi 80]. The position would seem to be substantially the same even after the 1976 amendment.

Virginity: Pre-1976 Position

Some cases of fraud (apart from mental abnormality) have also arisen. In a Punjab case which arose before 1976, the husband petitioned for a decree of nullity of marriage on the ground that the girl had lost her virginity before marriage. However, the husband did not succeed because in that case, the representation about her chastity had been made, not by the girl, nor by her relatives who were negotiating the marriage, but by her uncle [*Surjit Kumar v/s. Raj Kumari* AIR 1967 Punj 172].

Tuberculosis: Pre-1976 Position

In a Calcutta case, where the wife was found to be suffering from tuberculosis [*Anath Nath v/s. Laljabati Devi* AIR 1959 Cal 778], a decree of nullity of marriage was refused on the ground that the disease should be one mentioned in the Act as a ground of divorce — a reasoning which is of doubtful validity.

The proper test is to examine the quality of consent, as envisaged by S. 5(ii), Hindu Marriage Act (as amended) quoted above while dealing with nullity of marriage.

(From, *The Lawyers*, January 1990).

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P.M. Bakshi

Fraudulent Marriages and the Law

CASES HAVE ARISEN IN THE PAST regarding pre-marital pregnancy of the wife by another person. This is now specifically mentioned as a ground for nullifying marriage in most matrimonial statutes. There is a historical reason for the specific mention of this ground. English Courts, taking a narrow view of fraud, held that misrepresentation must go with the essence of the contract. Fraudulent concealment of pre-marital pregnancy or loss of virginity was not the type of fraud "which renders the mind of one of the parties not a truly consenting mind". [*Moss v/s. Moss* (1897) Law Reports (Probate Division) 763]. A false representation made by a woman that she was a virgin did not also justify annulment of the marriage [*Reeves v/s. Reeves* (1813) 2 Phill 125]. In America too, pre-marital unchastity (even if a child is conceived) did not afford a ground for matrimonial relief. [Hessenden, "Nullity of Marriage" (1899) 13 Harvard Law Review 110]. Subsequently, judicial attitude in some states in America changed, while in a few other states, it was made a ground for nullity by statute. In Maryland, it appears to be a ground for divorce. In England, in 1937, pre-marital pregnancy of the wife by any other person was made a specific ground of nullity of marriage.

Controversies on the subject have arisen in India also. In the Hindu Marriage Act, such pregnancy nullifies the marriage under S. 12. Husbands have often alleged pre-marital unchastity of the wife (apart from pregnancy) and sought to nullify the marriage on that ground. However, usually, they have not been able to establish the factual basis. [*Harbhajan Singh v/s. Brij Bala* AIR 1964 Punj 359; *Surjit Kumar v/s. Raj Kumari* AIR 1967 Punj 172]. Indian courts are more liberal, where consent to marriage is attacked on the ground of coercion of the other party [*Purabi v/s. Basudev* AIR, 1959 Cal 292].

However, in a Delhi case, the husband was successful in establishing that a child born after marriage had been conceived by the wife through

sexual relations before marriage with another person [*Madanlal v/s. Sudesh Kumari* (1987) 6 reports (Delhi) 219]. The court granted divorce to the husband on the basis of the wife's cruelty and held that in the circumstances of the case, the birth of the child to the wife amounted to "cruelty" towards the husband as there was evidence that because of the birth of an illegitimate child, he had a disturbed state of mind. According to the High Court, the fact that the husband could have sued for nullity of marriage could not deprive the husband of the remedy of divorce.

Under the Hindu Marriage Act as it existed before 1976, cases had also arisen of loss of virginity by the girl before marriage, and prayer for relief against marriage on the ground of fraud. The husband, however, did not succeed because the representation about the girl's chastity had been made, not by the girl or her relatives who negotiated the marriage, but by her uncle [*Surjit Kumar v/s. Raj Kumari* AIR 1967, Punj 172].

Concealing Previous Marriage

Recently, a converse situation arose before the Delhi High Court [*Rajinder Singh v/s. Promila* (1987) 6 reports (Delhi) 286, No.31]. In response to a matrimonial advertisement, R offered to marry P and the marriage took place in 1981. R did not disclose the fact that he had been earlier married to BK. A few months after the marriage, the first wife BK informed P (the second wife), her brothers and parents (through a gentleman) that BK was already married to R, the marriage having taken place in 1971. R pleaded that the marriage had been dissolved, but could not prove it. P petitioned for nullity of marriage on the ground of fraud. She succeeded. The fraud was held to have been established. As regards the legal aspect, the following observations were made by the Division Bench (consisting of Mr Justice R.N. Agarwal and C.L. Chaudhary), when the husband appealed:

"In our opinion, the pre-marital status of a party is a material fact which the other party must know before imparting consent for marriage. It may not be a very vital factor when both the parties are divorcees or there is a history of both of them being previously married. But in a case where one of the parties is previously married and the other is unmarried, it becomes a relevant aspect to be considered by the party who is unmarried. A party is under an obligation to disclose whether he was previously married or not. If so, what is the position of the previous spouse? In the present case, the appellant is contending that he had legally divorced the first wife, Balbir Kaur by means of a customary divorce but, on the other hand, Balbir Kaur was asserting that she was still the legally wedded wife of the appellant and there was no legal divorce. The appellant was obliged to disclose to the

Respondent about the factum of his previous marriage and the alleged divorce by custom, if any. This is an admitted case of the parties that the Respondent (wife) was a virgin. The previous marriage of the appellant with Balbir Kaur was a material fact concerning the appellant (husband) which was intentionally suppressed and was not disclosed to the Respondent. The case of the Respondent is that she was a virgin and she would not have consented to marry the appellant, had she known the fact that the appellant was previously married to Balbir Kaur."

The High Court noted that counsel for the appellant relied upon *Raja Ram v/s. Deepabhai* (AIR 1974 MP 52) in support of his contention that the concealment of the fact that the appellant had been once married to another woman could not be a ground for annulment of the marriage. But that judgement was pronounced under S. 12(1)(c) as it stood prior to the amendment of 1976. Section 12(1)(c), of the Hindu Marriage Act, prior to amendment, read as under:

"That the consent of the Petitioner, or where the consent of the guardian in marriage of the Petitioner is required under S. 5, the consent of such guardian, was obtained by force or fraud."

After the amendment of 1976, there is a radical change in clause (c). It is now made clear that the fraud may be:

"as to the nature of the ceremony or to any material fact or circumstance concerning the Respondent".

The High Court of Delhi further stated that it did not agree with the law laid down in Raja Ram's case. It did not accept as correct the abstract proposition, that in no circumstances, the concealment of the fact that the appellant had been once married to another woman could be a ground for annulment of marriage. It depends upon the facts and circumstances of each case.

Venereal Disease

Before 1976, the provision in the Hindu Marriage Act was less elaborate and most courts were adopting a narrow approach in conferring relief on the ground of fraud. Thus, in a Madhya Pradesh case [*Madhusudan v/s. Chandrika* AIR 1975 MP 174], the husband sought a decree of annulment of marriage on the ground that the wife had been suffering from (curable) syphilis before marriage. However, the court rejected the husband's prayer, on the ground that fraud must be as to the nature of the ceremony or as to the very identity of the parties marrying under the law, as it then stood. The position may be different if the disease is incurable. In a case decided between Christians under S. 19 of the Indian Divorce Act, the

husband sued for nullity of marriage on the twin grounds of impotency and fraud [*Birendra Kumar Biswas v/s. Hemlata* ILR (1921) Cal 282]. The fraud alleged was that the wife was suffering from incurable syphilis which had been concealed from the husband. The marriage had not been consummated. The court remanded the case for further investigation. But, in the circumstances of the case, annulment of marriage was regarded as permissible, since the possibility of cure of the disease was remote.

Tuberculosis

In a Calcutta case [*Ananth Nath v/s. Lajjabati Devi* AIR 1959 Cal 778], the wife had been found to be suffering from tuberculosis from a point of time before marriage. However, a decree of nullity of marriage was refused to the husband on the ground that the disease should be one mentioned as a ground of divorce. With respect, this reasoning seems to be of doubtful validity.

The range and dimensions of fraud have been examined by the courts in other contexts. For example, there is the aspect of mental abnormality, including epilepsy. Insanity arising after marriage is a ground for divorce. But pre-marriage mental abnormality is a ground of nullity of the marriage itself, provided it is proved that at the time of marriage, the other party had been suffering from recurrent insanity or recurrent fits of epilepsy.

Proceedings on Fraud

The ground of fraud, mentioned in S. 12(2)(c) of the Hindu Marriage Act, in 1976 has particularised the nature of fraud which can be put forth as a cause for annulling the marriage.

After 1976, a case came up before the Delhi High Court relating to schizophrenia [Asha Srivastava AIR 1981 Delhi 253]. The wife had been suffering from schizophrenia before marriage but the fact was concealed from the husband. After the marriage, the husband found that the wife was behaving curiously. It was learnt that even before marriage, the wife had to take medical treatment in the psychiatry department in the G. B. Pant Hospital, Delhi. She had hallucinations relating to places and persons. She was not aware of the movement of time and was withdrawn. At times, she became very angry and restless and lost her sleep and appetite.

All these facts were known before the marriage. Diagnosis of schizophrenia had been made six years before the marriage. The husband petitioned for annulment of marriage on the ground of fraud. The petition was filed within three and a half months of the marriage, because it was found that the woman was suffering from a mental disorder, such as not

responding to greetings, tearing off one's clothes and breaking crockery in the house. The husband's prayer for annulment of marriage was granted.

The Delhi High Court pointed out that the wife's disease was incurable, though the wife had short spells, during which she would behave normally. According to a medical expert, the wife's disease (schizophrenia) was incurable, an aspect greatly emphasised by the court.

Lunacy

In a Calcutta case decided under the Hindu Marriage Act before 1976 [*Krantik Chandra v/s. Manjurani* AIR 1973 Cal 545], the husband alleged fraud by the wife on the ground that she had been suffering from lunacy, but lost the case for want of proof. It was held that a wife's unusual or abnormal behaviour during the two or three days she was in her husband's house could not be termed as "lunacy", especially in view of the fact that just a few weeks before the marriage, the wife had appeared for the school final examination.

There is a case of (alleged) pre-marriage epilepsy [*Raghunath v/s. Vijaya* ILR (1971) Bom 511 AIR 1972 Bom 132], where the husband was seeking annulment, pleading fraud in the shape of non-disclosure by the wife of her epilepsy. Refusing relief, the High Court laid emphasis on the fact that the epileptic condition which the wife was suffering from was curable. Hence a representation that the wife was healthy did not amount to fraud. Another factor that went against the husband was that he had lived with the opposite party as her spouse even after discovery of the fraud, thus condoning the alleged flaw in consent.

As regards initial lunacy, the provision in the Hindu Marriage Act before 1976 was that the marriage could be voided if the opposite party was an "idiot" or a "lunatic" at the time of marriage. These words were not defined and, in construing them, recourse was generally made to S. 3(5) of the Indian Lunacy Act, 1912.

Before 1976, it had been held that where a party had, before marriage, suffered from an occasional mental derangement but was healthy at the time of marriage, there could be no decree of annulment [*Munishwar Datt v/s. Indra Kumari* AIR 1963 Punj 449]. The crucial date was that of marriage. This was also the judicial construction of the pre-1976 provision in the Special Marriage Act [*Solomon v/s. Josephine* AIR 1959 Mad 151].

(From, *The Lawyers*, October-November, 1995).

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Farida Pardawala

Divorce by Mutual Consent

The provision relating to divorce by mutual consent was introduced in Hindu Law by the Marriage Law (Amendment) Act, 1976. In the Special Marriage Act, this provision has existed from inception. Just as the parties can obtain a consent decree from the courts under Order 23 Rule 3 of the Civil Procedure Code (CPC), so they can file a petition for divorce under S. 13B of the Hindu Marriage Act 1955 to obtain divorce by mutual consent.

Conditions

The requirements for the presentation of the petition by mutual consent are the following:

1. The spouses have been living separately for a period of one year.
2. They have not been able to live together.
3. They have mutually agreed that their marriage should be dissolved.

After the presentation of the petition, the parties have to wait for six months, after which they can apply to the court for a decree of divorce dissolving their marriage. The parties are also free to withdraw their petition within that period.

Changes

Recent judgements under S. 13B of Hindu Marriage Act 1955 are good examples of judicial social engineering making divorce easier.

In fact, even as far back as in 1981, in *Indrawal v/s. Radheraman* (AIR 1981 ALL 151) Justice Deoki Nanda observed: "The policy of law having undergone a change after the Marriage Laws (Amendment) Act, it is

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possible now to dissolve a marriage by agreement between the parties although none of the grounds on which marriage be dissolved by court, be found to exist." In this case the husband and wife entered into a compromise decree at the appellate stage, and the marriage was dissolved even though the technical requirements of S. 13B were not fulfilled.

Withdrawal of Consent

A step forward is the judgement of the Bombay High Court delivered by Justice Sharad Manohar in *Sudhakar Vinayak Joshi v/s. Sulabha Sudhakar Joshi* [I (1986) DMC 336] where it was held that the continuance of S. 23 (I)(c) in the Hindu Marriage Act, 1955 purporting to put an embargo upon divorce by collusion cannot be a bar to the court's jurisdiction under S. 13B of the Act or under Order 23 Rule 3 of the Civil Procedure Code (CPC). If the two spouses agree to take divorce under S. 13B of the Hindu Marriage Act by consent they can likewise agree to take divorce in accordance with the provisions of Order 23 Rule 3 of the Civil Procedure Code (CPC), because now after the statutory acceptance of the concept of divorce by consent, it has got to be held that agreement to divorce is a lawful agreement. This judgement is the legal declaration of the fact that the continuation of S. 23 (1)(c) in the Hindu Marriage Act is an anachronism after the statutory acceptance of the concept of divorce by consent under S. 13B and is to be regarded as dead letter. However, the agreement to take divorce under Order 23 Rule 3 can be perfectly reconciled with the provisions of S. 23(2) of the Hindu Marriage Act. All that the court is required to do initially is to try to bring about a reconciliation and if that is not possible, to give sufficient time to both the spouses to retrace their steps.

Another important point stressed in *Joshi* is that even if one of the spouses remains absent, the court has jurisdiction to pass a decree for divorce in favour of the spouse who attends the court.

An interesting question arose in *Smt Jayshree Ramesh Londhe v/s. Ramesh Bhikaji Londhe* (AIR 1984 Bom 302) — Can one of the parties withdraw a joint petition and can consent once accorded be later withdrawn? It was held by Justice Gadgil that there cannot be any abandonment of a petition filed under S. 13B without the consent of both parties. Such permission would nullify the very purpose of a joint application. What is material is whether the requirements of S. 13B were existing when the petition was filed. The fact that at a later stage either party does not want a divorce would be irrelevant.

The same trend is also reflected in the decision given by Justice Pritpal Singh in *Nachhattar Singh v/s. Harcharan Kaur* (AIR 1986 P&H 201)

where it was held that if both the parties had voluntarily consented to file the petition for dissolving the marriage by mutual consent and all the other conditions mentioned in subsection (1) of S. 13B of the Act are fulfilled, it would not be open to either party to withdraw the consent.

Section 13(2) Directory

An even more liberal construction to S. 13B(2) of the Hindu Marriage Act, 1955 was given by the Andhra Pradesh High Court in *K. Omprakash v/s. K. Nalini* (AIR 1986 AP 167) which stresses the importance of construing S. 13B(2) as a directory and not a mandatory provision. This is a welcome deviation from the normally strict interpretations and gives effect to the fact that the statutory provision, though mandatory in form, can yet be treated as directory in substance. Section 13B(2) no doubt cautions the court of its duty to fight to the last to save the marriage. However, if the interests of justice and of the individuals involved require it, the marriage tie should be put asunder immediately. S. 13B(2) does not impose any fetter on the powers of the court to grant decree of divorce. At any rate, the time table fixed by S. 13B(2) does not apply to an appellate court.

Consent Divorce

In fact, the six months time fixed by S. 13B(2) is not a rule relating to the jurisdiction of the court to entertain a petition filed for divorce by consent. The question of jurisdiction is dealt with by S. 13B(1) of the Act and must be strictly complied with. Section 13B(2) is a part of procedure. A procedural provision must be interpreted as a handmaid of justice in order to advance and further the interest of justice and not as a technical rule impeding it.

It may, however, be noted that S. 13B(2) as applicable to the exercise of matrimonial jurisdiction by the appellate courts becomes totally unworkable.

Appellate Courts

On a literal reading of S. 13B(2) the courts cannot pass a consent decree of divorce beyond eighteen months period from the date of its filing. In the event that such an application is filed by the parties and the courts for some reason of human error or failure did not or could not dispose it off within the period of eighteen months, the literal meaning of S. 13B(2) prevents the courts from granting the relief thereafter. Similarly, if a petition for divorce by mutual consent was dismissed by the Lower Court for some reason, the appellate court would be powerless to grant that relief on the basis of the application filed in the Lower Court because eighteen months must have

elapsed by the time the matter reached the appellate forum although the parties are still fighting relentlessly in the appellate court.

To summarise, the following important points emerge from the above decisions:

1. By virtue of S. 13B, agreement to take divorce is a lawful agreement, and two spouses can agree to take divorce in accordance with the provisions of Order 23 Rule 3 of the CPC.

2. Section 23 (1)(c) is a dead letter in view of S. 13B.

3. Despite the absence of one spouse from the court, a decree for divorce can be passed in favour of the spouse who remains present in the court after the six months period.

4. A petition for divorce by mutual consent cannot be abandoned, revoked or withdrawn by one of the parties without the consent of the other.

5. Section 13B(2) is directory and not mandatory.

6. Appellate courts are not bound by S. 13B(2).

It seems clear, therefore, that divorce laws are taking a liberal turn. No system of law can produce marital bliss, but human laws may at least alleviate suffering. And when marital life is wrecked, the home utterly broken up by misunderstanding, jealousy, cruelty, or infidelity, what greater boon can two persons have than the power to secure their liberty? Rigid and unjust laws call for the intervention of the law reformer. Hopefully, such liberal decisions relating to the concept of mutual consent will pave the way for a better future of the parties by relieving them without much heartache, of a companionship which has become odious. However, while it is imperative that these demands be satisfied, it is equally important for courts to consider the economic aspects relating to alimony and maintenance, providing security to the women, before granting such a decree.

(From, *The Lawyers*, September, 1986).

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Shyam Mehta

Divorce by Mutual Consent

BEFORE EXAMINING THE VARIOUS JUDGEMENTS on S. 13B, it is important to clarify what the section itself contemplates. Subsection (1) of S. 13B of the Hindu Marriage Act, 1955 lays down the three conditions which are the necessary pre-requisites for filing a petition for divorce, by mutual consent. They are:

1. the parties should have lived separately for a minimum period of one year;

2. they should be unable to live together;

3. they should have mutually agreed that the marriage should be dissolved.

If these three conditions are fulfilled, the parties may present a petition for divorce under S. 13B.

Subsection (2) of S. 13B provides that upon motion of both the parties, between six and eighteen months after the presentation of the petition, the court shall, on hearing the parties and after making such enquiries as it thinks fit, and after being satisfied that the marriage has been solemnised and that the averments in the petition are true, pass a decree for divorce. This subsection merely provides the procedure to be followed by the court for granting the decree for divorce.

Can Consent be Withdrawn?

The question that has come up for adjudication in the various High Courts of India is whether one of the parties to a joint petition for divorce by mutual consent can withdraw such a petition or such consent unilaterally. Let us examine the views expressed by these courts.

The Bombay High Court in its decision in *Jayashree v/s. Ramesh* [AIR 1984 Bom 302], has supported the view that once a joint petition for

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divorce by mutual consent has been filed, one spouse cannot withdraw the consent to the petition. The facts of the case were that both parties filed a joint petition in the District Court for divorce by mutual consent under the provisions of S. 13B of the Hindu Marriage Act. The petition was kept pending for a period of six and a half months after which the husband made an application to the court stating therein that he was withdrawing his consent which he had given when he was in a vacillating and indecisive mood and that he was no longer willing to give a divorce to his wife. The learned assistant judge held that either party can withdraw the petition and the original consent and on these grounds, dismissed the joint petition for divorce.

Subsequently, the wife appealed to the High Court against the dismissal of the petition under S. 13B. It was the Appellant's contention that since S. 21 of the Hindu Marriage Act provides that all proceedings under the Act shall be regulated by the Code of Civil Procedure, 1908 and neither the Act nor the High Court Rules make any provision as to how a proceeding under the Hindu Marriage Act can be withdrawn, the provisions of Order 23 Rule 1 of the Civil Procedure Code would apply. Subrule (5) of this Rule states: "Nothing in this Rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under subrule (1) or to withdraw, under subrule (3) any suit or part of a claim, without the consent of the other plaintiffs."

The learned single judge, B.C. Gadgil, has held (at pg. 304) that: "it would thus be clear that in any case one of the co-plaintiffs would not be able to abandon the suit more particularly when the other co-plaintiff has not consented to such abandonment..." and has further held (at pg. 305) that: "it will not be possible for any party to voluntarily agree to have a divorce by mutual consent or to revoke or withdraw that consent at a later stage. Such permission would nullify the very purpose of a joint application..."

It was also the Appellant's contention that S. 13B contemplated a joint application by both the parties and the withdrawal of this type of an application could be made jointly by both and not by either party. The whole scheme of S. 13B would be frustrated if it were held that after having made a joint application, any party could withdraw that application and that too without the consent of the other party.

Once again, the learned single judge upheld the contention, stating (at pg. 306) that "when a joint petition for divorce by mutual consent is filed, fulfilling all the requirements as laid down in the section, it was not open at a later stage for either party to say that he or she did not want the divorce. Once these requirements are proved, it would be necessary for the court to

grant a decree for divorce. The fact that at a later stage either party does not want a divorce would be irrelevant."

This decision of the Bombay High Court has been followed in *Nitin v/s. Padmini* [I 1985 DMC 347 Bom], *Meena Dutta v/s. Anirudh Dutta* [II 1984 DMC 388 MP], *Chander Kanta v/s. Hans Kumar and Anr.* [AIR 1989 Delhi 73], among others.

Judgement Against Unilateral Withdrawal

There have also been various dissenting judgements, the notable ones being, *Mohanan v/s. Jeejabai* [AIR 1988 Ker 28] and *Harcharan Kaur v/s. Nachhattar Singh* [AIR 1988 P&H 27].

In the former, the facts of the case are that the husband and wife filed a petition for divorce by mutual consent under S. 13B of the Hindu Marriage Act. Four months later, the Respondent wife filed an affidavit stating that she had not consented to the divorce and had not read the petition before signing it and therefore she should be allowed to withdraw the petition. On these grounds the additional subordinate judge dismissed the petition. The husband had subsequently come in appeal to the High Court.

Relying on the decision in *Jayashree v/s. Ramesh*, the Appellant contended that Order 23 Rule I of the Civil Procedure Code is applicable and one of the parties to the petition for divorce by mutual consent cannot unilaterally withdraw the consent or the petition. Dismissing this plea, the learned judge, Sivaraman Nair said (at pg. 30), that:

"Satisfaction of the court, after hearing the parties and after conducting an enquiry, necessarily contemplates an opportunity for either of the spouses to withdraw the consent or to indicate from other circumstances that an order of divorce, in terms of the application, may not be desirable. The situation arising under Order 23 Rule 1 of the Civil Procedure Code cannot be considered as similar to the situation arising under S. 13B(2) of the Hindu Marriage Act."

Recently, a single judge of the Delhi High Court, Mrs Justice Sunanda Bhandare, in the case of *Smt Chander Kanta v/s. Hans Kumar and Anr.* [AIR 1989 Delhi 73], has taken an interesting and correct view that a petition presented under S. 13B(1) of the Hindu Marriage Act cannot be withdrawn by one part unilaterally. The learned judge has further held that if the court is satisfied that the consent was not free consent and it was the result of force, fraud or undue influence, then it is a different matter, because in such a case, the court is empowered specifically to refuse to grant the decree. The court has further observed, that if one party was

allowed to withdraw the consent even when other grounds, namely that the parties continue to live separately and have not been able to live together, still subsist and reconciliation is not possible, then it will frustrate the very purpose of the Act.

Relying upon S. 23(1)(bb) of the Act, the learned judge further observed that under this provision, the court is empowered to grant the decree even in an undefended case, if the court was satisfied that the averments in the petition were true and the consent for the mutual divorce had not been obtained by force, fraud or under influence. Hence, the court held that if unilateral withdrawal of consent was permitted, the court would not be able to pass a decree in an undefended case under S. 23(1)(bb). The court also relied upon the decision of the Bombay High Court in *Jayashree v/s. Ramesh* and granted divorce. Whilst doing so, the learned judge did not follow the decisions in *Mohanan v/s. Jeejabhai* and *Harcharan Kaur v/s. Nachhattar Singh.*

The Delhi High Court has taken a view, which, read with the view expressed by the Bombay High Court, should seal the fate of all cases of unilateral withdrawal of consent by one party after agreeing to a divorce by mutual consent.

Conclusion

Despite the views of the Bombay and Delhi High Courts, there are a few points which merit mention:

a) Section 13B(1) of the Hindu Marriage Act brings into existence a statutory contract between the parties who have agreed to dissolve their marriage by mutual agreement. Please notice that the language used in the said section is "agreement" and not "consent".

b) Once a petition under S. 13B(1) is filed, either party is estopped from resiling from the original statutory agreement on the principle of promissory estoppel. This doctrine of promissory estoppel has been formulated with characteristic lucidity in Halsbury's *Laws of England* [3rd Edn., Vol.15, pg. 175, para 344], and has been applied by Mr Justice Vimadalal in *Air Corporation Employees' Union v/s. G.B. Bhirade* [1969 (71) Bom LR 707] in the following terms: "when one party has by his word or conduct, made to the other a promise or assurance which intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made..." The learned Justice Vimadalal has further said (at pg.712), that "the representation on which promissory estoppel is founded is not

representation with regard to an existing fact, but it is in regard to something promised to be done in the future..."

c) The entire period of eighteen months described in subsection (2) of S. 13B is for the purpose of giving an opportunity to the parties to reconcile if possible and not to withdraw the consent and frustrate the provisions of law.

d) Though the words used in subsection (2) are "on motion of both the parties", it does not mean that the court is powerless, just because one party refuses to join in the motion. The court's power under subsection (2) is to enquire into the averments contained in the petition and hence, one party withdrawing his or her consent, does not mean that the court becomes *functus officio* or that the court is deprived of its power to conduct such an enquiry.

e) Subsection (2) is a procedural section and provides for the court's power to grant a decree for dissolution of marriage after carrying out the requisite enquiry. Procedural law is the handmaid of justice and should be construed accordingly.

f) Even on the principle of interpretation of statues, it is the duty of the court to give effect to legislation and not to nullify it in case of absurdity or conflict in the provisions of law. This is clear from the dictum: "Suppress the mischief and advance the remedy."

(From, *The Lawyers*, October 1989).

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Shrinivas Gupta

Breaking the Sacred Bond Mutually

RECENTLY, THE SUPREME COURT OF INDIA on 12 February 1991, in the case of *Om Prakash v/s. Smt Sureshta Devi* [JT 1991 (1) SC 321] has observed that in a divorce petition, it is open to one of the spouses to withdraw the consent given to the Petitioner by mutual consent under S. 13B of the Hindu Marriage Act, 1955 at any time before the court passes a decree for divorce. The satisfaction of the court after holding an inquiry about the genuineness of the consent, necessarily contemplates an opportunity for either of the spouses to withdraw the consent. This important ruling was given by a Division Bench consisting of Justice K.J. Shetty and Justice S.C. Agarwal.

The facts of the case were that the Appellant, Sureshta Devi was married to the Respondent Om Prakash in November 1968 and they lived together for about six to seven months. Thereafter the wife did not stay with her husband except from December 1984 to January 1985 and that too, pursuant to an order of a court. But they did not live like husband and wife during this period also. Both of them went to Hamirpur on 8 January 1985. The wife was accompanied by the counsel where, after a short discussion, they moved a petition under S. 13B of the Act for divorce by mutual consent in the District Court at Hamirpur. The court only recorded the statement of the parties that day. On 15 January next, the wife filed an application in the same court *inter alia* alleging that her statement on 8 January 1985 was obtained under pressure and threat from the husband and she was not allowed even to see or meet her relations to consult them before filing the petition. She said that she would not be a party to the petition and prayed for its dismissal. The District Court judge made certain orders which were taken up in appeal before the High Court, which remanded the matter to the District Court for fresh disposal. The district judge ultimately dismissed the petition.

When the case reached the High Court of Himachal Pradesh in appeal,

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it reversed the order of the district judge and granted a decree for dissolution of the marriage by mutual consent. The High Court held that the spouse who had given the consent to the petition could not unilaterally withdraw the consent and such withdrawal would not take away the jurisdiction of the court to dissolve the marriage by mutual consent, if the consent was otherwise free. It was also recorded by the High Court that the wife gave her consent to the petition without any force, fraud or undue influence and, therefore, she was bound by that consent.

An appeal against the decision of the High Court concerning the validity of the decree of dissolution of the marriage by mutual consent, was filed before the Supreme Court, which held that from the analysis of S. 13B of the Hindu Marriage Act, 1955 which was in *pari materia* with S. 28 of the Marriage Act, 1954 it would be apparent that the filing of the petition with mutual consent did not authorise a court to make a decree for divorce. The court observed further, "There is a period of waiting for six to eighteen months. This interegnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and decide not to proceed with the petition. The spouse may not be a part to the joint motion under S. 13B(2) of the Act."

Section 13B

Section 13B of the Hindu Marriage Act, 1955 reads as follows, namely:

"1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

"2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in subsection (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

Thus, what clause (1) of the aforequoted provisions requires is that the petition must be presented by both the parties to the marriage together and

that the petition must state that (1) they had been living separately for a period of one year, (2) that they had not been able to live together, and (3) that they had mutually agreed that the marriage should be dissolved.

Likewise S. 13B(2) requires that (1) the motion must be made by both the parties, (2) it must be made not earlier than six months and not later than eighteen months after the presentation of the petition, and (3) that the court must be satisfied that the averments made in the petition are true.

Half Mutuality

In *Jaishree v/s. Ramesh* [AIR 1984 Bom 32] while the mutual consent petition was pending and six months had passed, the husband changed his mind and filed an application in the same court stating that he did not want to dissolve the marriage and live separately from his wife. The wife however, still wanted divorce. The court dismissed the petition and did not grant divorce under these circumstances. The wife then appealed in the High Court where the main issue was whether or not a party to a joint petition for divorce by mutual consent could withdraw his or her consent for divorce. The High Court observed that the crucial time for the consent for divorce under S. 13B was the time when the petition was filed. If consent was free and not vitiated, it was not possible for any party to nullify the petition by withdrawing the consent and thus the divorce by mutual consent was decreed.

The decision in this case raised two important questions: one, whether there was (complete) mutuality in filing the petition as required under S. 13B(2) and the other, whether half mutuality was enough for the purpose? Justice B.C. Gadgil of the Bombay High Court observed that the crucial time for the consent for the divorce under the section, was the time when the petition was filed and that the husband could not withdraw from the petition unless, in the inquiry held by the court under S. 13B(2), it was found that the petition was to be validly presented under S. 13B(1). The petition could be invalidated for lack of free consent at the time of its presentation. But the court's refusal to allow the husband refusing to join the motion under S. 13B(2), was based on Rule 1(5) of Order 23 of the CPC of 1908 of which the applicability is debatable.

So also in the case of *Nachhatar Singh v/s. Harcharan Kaur* [AIR 1986 P&H 201], a joint petition was filed by a couple for divorce under S. 13B; but later the wife filed a statement expressing her unwillingness to give divorce. At this the trial court dismissed the petition, but when the husband appealed in the High Court of Punjab and Haryana against this dismissal, his petition was allowed. The court observed, "The Act does not envisage withdrawal of consent by one party. The petition can be dismissed as

withdrawn only if both the parties who had filed the petition, together agree to withdraw the same... if both the parties had voluntarily consented to file the petition for dissolving the marriage by mutual consent and all the other conditions mentioned in subsection (1) of S. 13B of the Act are fulfilled, it will not be open to a party to withdraw the consent."

Thus having gone through the rulings of two different High Courts on the point of concept of mutuality as required under S. 13B, we find that the position was not clear. In both the abovenoted cases it was ruled that one party could not withdraw his or her consent and that the crucial time for giving consent was the time for presenting the petition while the language of S. 13B of the Hindu Marriage Act, 1955 nowhere says that the withdrawal of the petition shall be made by both the parties together and that one of the spouses cannot withdraw. This leads to an obvious conclusion that as soon as one of the spouses withdraws, the contemplated mutuality of consent ceased to exist.

Waiting Period

Another important point is that a waiting period of six to eighteen months has been laid down in the Act. The idea behind providing this waiting period is to enable the parties to give a second thought to their decision. This is a very important provision as this gives them the opportunity to take advantage of counselling, reflection and the good offices of relatives and to resolve their differences. It is only because of this fact that the legislators have made no provision for the divorce to take effect immediately after presentation of a joint petition.

In both the above cases the High Courts observed that the time gap was given so as to facilitate only joint withdrawal. A relevant implication is that if both the parties change their mind and decide to withdraw the joint petition, they need not go to the court, as after the lapse of 18 months that will automatically become void. In other words there are more chances for withdrawal by either of the parties and less by both of them.

Hence it may be submitted that the withdrawal of the consent can be made jointly or severally as has also been held recently by the Apex Court in the case of *Smt Sureshta Devi v/s. Om Prakash.* The decision of the Supreme Court is indeed, very important, specially for those who decide in haste or passion and file the petition for divorce of their marriage by mutual consent under S. 13 B of the Hindu Marriage Act and repent subsequently. This ruling has settled once and for all contradictory views expressed by various High Courts.

(From, *The Lawyers*, May, 1991).

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K. Chandru

Divorce! Do We Need a Change in The Law?

On 27th February 1981, a Bill was introduced in the Lok Sabha (Bill No.23 of 1981) proposing certain amendments to the Hindu Marriage Act, 1955 and to the Special Marriage Act, 1954, which made irretrievable breakdown of marriage a new ground for divorce. Since the matter was of great significance, Parliament by a resolution dated 18 September 1981, referred the Bill to a Joint Select Committee. The Committee extensively toured the country, circulated a questionnaire and received responses from people belonging to various walks of life after which it submitted a report to Parliament recommending against its introduction. Thus the Bill lapsed.

Recently however the Law Commission has taken up the thread left by the Parliamentary Committee and has circulated a questionnaire calling for responses from all over the country. This paper attempts to examine the issue in depth.

The Current Law

"Our matrimonial law is based on the doctrine of matrimonial offence. Divorce is for a real matrimonial wrong. Culpability is a ground of divorce. It cannot just be granted for the trivial ups and downs of married life. It cannot be granted even when the court is satisfied that the marriage has completely broken down or broken up, whichever way one may put it. The Hindu Marriage Act has introduced the principle that a broken marriage can be treated like any other civil wrong, prove the wrong done to you and the law will grant its remedy. Here the finding is that the husband is in desertion. He cannot therefore take advantage of his own wrong. Law cannot come to his help. This is a broken marriage. There is no reasonable prospect of a reconciliation. But in law no remedy can be given to the

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husband. We have to apportion the 'fault' or the 'guilt'" [*Mohinder Pal Singh v/s. Smt Kulwant Kaur* AIR 1976 Delhi 141].

"Divorce, under the Act, as at present reflects in the main three categories of grounds. The first is the traditional theory of matrimonial fault (basing divorce on matrimonial offence, giving the right to the innocent party to apply for relief and vesting discretion in the court to grant relief). The second is the theory of frustration by reason of specified circumstances. The third is the theory of consent. There is however, no theory of the breakdown of the marriage except to a limited extent". [See Law Commission, 71st Report].

Prove Guilt to be Free

As can be seen, the law requires proving matrimonial guilt. It requires a party to make allegations against the other. This brings a lot of unpleasantness. Further, the court also requires a high standard of proof in such circumstances. For example, dealing with "cruelty" which is one of the grounds for divorce, the Supreme Court observed as follows.

"Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued cohabitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage law" [*Dr N.G. Dastane v/s. Mrs S. Dastane* AIR 1975 SC 1543].

Changes: Slow But Steady

However, the Hindu Marriage Act has undergone a vast change and by virtue of the amendment of 1964 and by introducing S. 13(1A), the law has been widened to a considerable extent. In fact even before the present Bill which introduces "irretrievable breakdown of marriage" as another ground, S. 13(1A) had already brought a similar position though in an indirect form. Referring to this changing attitude, a full Bench of the Punjab and Haryana High Court in *Bimla Devi v/s. Singh Raj* [AIR 1977 P&H], observed as follows:

"The legislative policy is clear. It is to make divorce liberal and easy for parties whose marriages have broken down irretrievably as evidenced by the fact that there had been no resumption of cohabitation or restitution of conjugal rights within the prescribed period. It is to provide the basis for dissolving dead marriages with the minimum of rancour and hostility and the maximum of humanity."

High Courts in a Fix

However, many High Courts at times have been faced with the situation where even though they wanted to grant divorce, they could not do so due to the inadequacy of the legislation. In *Parihar v/s. Parihar* [AIR 1978 Rajasthan at pg. 140], the High Court of Rajasthan observed as follows:

"It appears therefore that a marriage in which the parties could no more live together deserved to be dissolved. But there is no provision in the Act that a marriage which has broken down irretrievably should be dissolved. Even in England this was introduced by the Matrimonial Causes Act 1973, but the courts even earlier appeared to be acting upon it, and have shown much ingenuity where justice demanded a remedy."

Other High Courts have expressed similar sentiments as is clear from the following extracts:

"Marriage is an alliance. In this case it has proved to be an unresolved conflict. In 1934, Sir Alan Herbert, the promoter of the Matrimonial Causes Act, 1937 wrote a book. He called it Holy Deadlock. I think this marriage can well be described as a holy deadlock. It has long ceased to be a holy wedlock. Such a case as this cries aloud for reform." [*Mohinder Pal Singh v/s. Smt Kulwant Kaur*, AIR 1976 Delhi 141]

Even in other countries, we would see such a reform having been brought in tune with the changing concepts of marriage laws.

"In England the 20th Century has seen fundamental changes in this law. The principle of matrimonial offence came under pressure and is now destroyed. The new Divorce Reforms Act, 1969 has eliminated the doctrine of the matrimonial offence. There is now only one ground of divorce... 'irretrievable breakdown of marriage' (Riddle Lectures 1970 — Reprinted in Raydon on Divorce — 11th Edn. pg. 3223)."

Apart from the United Kingdom, countries like the German Democratic Republic, the Peoples' Republic of China and the U.S.S.R. have in their marriage laws made provisions for the dissolution of a marriage based on the concept of irretrievable breakdown. Section 24 of the Family Code of the German Democratic Republic is as follows:

"A marriage may only be dissolved if a court has established that the marriage has broken down irretrievably and thus lost any meaning for man and wife, the children and so for society as well."

"If one partner applies for divorce, the court shall carefully examine the history of the marriage and especially take into account the interests of any minor children of the family, and whether a divorce would mean unreasonable hardship for one of the partners."

Article 14 of the Fundamentals of Legislation of the U.S.S.R. and the Union Republics on marriage and family read as follows:

> A marriage is terminated by the death of one of the spouses or by a declaration of the death of one of the spouses in a judicial proceeding.
>
> During the lifetime of the spouses, a marriage may be dissolved through divorce on the application of one of the spouses or both.
>
> A marriage is dissolved in a judicial proceeding. The court takes measures to reconcile the spouses.
>
> A marriage is dissolved if it is established by the court that the continued conjugal life of the spouses and the preservation of the family have become impossible.
>
> A husband has no right to institute a divorce case without his wife's consent during her pregnancy and one year after the birth of a child.

Safeguards

Apprehensions are raised in certain quarters that this amendment will be used by husbands, who are in far more advantageous positions in terms of economic and social status, against their wives, who are generally economically weak and dependent. These apprehensions can be allayed by providing necessary safeguards for compulsory maintenance and also by making provisions for children born out of wedlock. In fact, as early as the 1940s, when changes were being considered in Hindu Law, Mr Justice Krishnaswamy Iyengar in one of his judgements observed as follows:

"At no time did those standards (the ancient standards fixed by the rishis) and the rules in which they found expression attain to universal acceptance in the country, even among communities professing the Hindu faith... We cannot shut our eyes to changes almost revolutionary in character and extent which have been for a considerable time past taking place in the structure of the Hindu social order and in the ideas and sentiments which govern it. The old sanctions seem to have all but disappeared, sweeping away before them the old faith and the old institutions which did constitute in the past an integral condition of the indigenous fabric" [*Durgaprasada Rao v/s. Sundersanaswami* AIR 1940 Mad 513 at pg. 517].

In conclusion, therefore, the present attempt for reform of the law should be welcomed as it merely brings the law in tune with modern

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Part Four

Maintenance, Custody and Guardianship

31

Nilima Dutta

Maintenance, Custody and Guardianship Rights of Women

APPLICATIONS FOR MAINTENANCE, custody, access to children, or return of property can be made while matrimonial proceedings are pending. Such applications for maintenance or custody can be also made independently without filing matrimonial proceedings.

Interim Maintenance

The common problems many women face are lack of adequate finances to initiate and continue legal proceedings on the breakdown of a marriage. Most of the Personal Laws have provisions for giving maintenance to the woman during the proceedings to enable her to continue with the litigation. The maintenance given while the case is in court is called maintenance *pendente lite* or interim or temporary maintenance.

Who is Entitled?

Amongst Christians and those married under the Special Marriage Act, it is only the wife who can claim maintenance from the husband. Under Hindu and Parsi laws either spouse can claim maintenance from the other depending on whose financial circumstances are worse.

There is no special matrimonial law for Muslims under which maintenance and custody can be claimed. A Muslim woman has to claim maintenance either under common law or under S. 125 of the Criminal Procedure Code or under the Muslim Women (Protection of Rights on Divorce) Act, 1986.

In addition to maintenance which can be claimed under the different marriage laws, Hindu women can claim maintenance under the Hindu Adoption and Maintenance Act, 1956. Under S. 18 of this Act a woman can claim maintenance as well as separate residence from her husband, if he has

committed any of the matrimonial offences such as cruelty, adultery, etc., without filing a petition for divorce.

Basis of Claim

The wife can claim maintenance when a husband neglects to maintain the wife without cause. The woman must show the judge that:

1) She is the legal wife. 2) The husband has neglected or failed to maintain her on purpose. 3) She is unable to maintain herself and her children, or if she is earning, her income is far below her needs. Maintenance can be claimed even if parties live on the same premises.

The judge is not supposed to inquire which person is at fault when awarding temporary maintenance.

When to Apply

An application for maintenance should be made as early as possible after matrimonial proceedings are filed. This is done to avoid doubts raised later about the wife's ability or capacity to maintain herself.

Amount of Maintenance

Christian wives are given one-fifth of the husband's income. Amongst Hindus, Parsis and those married under the Special Marriage Act, 1954 there is no hard and fast rule for awarding maintenance. The judge usually looks at the financial condition of both parties. If the wife has no income of her own, or earns less than her husband, or less than what she needs, the judge will award a suitable amount based on the claim made. Before going to court, it is important to try and ascertain the following:

1) total income of the husband from all sources including bank deposits, stocks and shares.

2) Movable property such as cars and expensive electrical gadgets.

3) Club memberships.

4) Immovable property owned.

It is not important whether the wife's parents or other family members are well off or not. The law casts a duty on the husband to maintain the wife if she is in need.

Variation of Orders

Pendente lite or interim orders can be varied subsequently by the court if the husband applies for it. Some of the grounds under which variation can be sought are loss of the husband's income, new job taken by the wife or

receipt of a new sudden source of wealth by the wife.

Permanent Alimony

Alimony is an order granting a certain amount of maintenance to be paid continuously at regular intervals after all proceedings are completed in court and orders have been passed by the judge. Alimony can be given in periodical sums or in a lump sum.

Amount of Alimony

There is no fixed formula for the amount of alimony. The judge will consider the needs of the wife, her separate income, her property, the husband's means and ability to pay, the ages of the parties, their social status and similar factors.

Can Alimony Orders be Changed?

The judge can vary the alimony order if circumstances of the parties change. The husband can apply for a reduction or stoppage if:

1) The wife remarries or cohabits with another man (proof of this is required).

2) If he loses his job or income from other sources.

3) If he becomes permanently disabled or ill.

4) If the wife finds a job or acquires wealth.

Similarly the wife can make an application for increase of alimony if circumstances change. For example, if her expenses go up or if her husband's income increases.

Maintenance for Children

If a woman gets custody of the minor children she can claim maintenance *pendente lite* as well as permanent maintenance till they reach majority, i.e. the age of 18. While making such applications, she must itemise all expenses of food and clothing, school and college fees, school expenses and others. If the children's expenses go up, the court can increase the maintenance when the wife makes an application. Recently some courts have taken the view that children over 18, who are still dependent on their parents for educational expenses and other maintenance expenses, should continue to get maintenance.

Maintenance Under the Criminal Law

Maintenance can also be claimed under S. 125 of the Criminal Procedure Code. The applications are to be made to a Family Court where

one exists, or any Magistrate's Court where there is no Family Court. The court fees are nominal and proceedings are quicker so people prefer to seek this remedy to avoid destitution.

Under S. 125 of the Criminal Procedure Code, 1973 a wife can make an application for maintenance to any Magistrate's Court or to a Family Court. A wife includes a divorced wife, who has not remarried. Minor legitimate or illegitimate children can also make applications for such maintenance. The maximum amount that can be given to each person is Rs 500 per month. Any wife irrespective of her caste or religion, can make an application for maintenance. Muslim women who are divorced after 1986 are covered by the Muslim Women's (Protection of Rights on Divorce) Act, 1986 and cannot apply under S. 125 unless husband and wife agree to have the case tried under S. 125.

Procedure

The application for maintenance to the magistrate or the Family Court judge must specify:

1) that the woman does not have the means to support herself;

2) that the husband who is an able bodied person is capable of earning money, or he is a person with income;

3) that the husband has neglected and failed to maintain the wife.

The court has the power to grant interim maintenance also at the first or subsequent hearings of the case.

Enforcement of Orders

If a husband is aware of an order against him for payment of maintenance and he fails to pay, the court can issue distress warrants, by which any movable property of the husband can be attached or taken over by the court. The property can be sold and the money realised given to the wife and children. The police are required to enforce the distress warrants. The husband can also be arrested for failure to pay.

Custody

All the marriage laws except the Dissolution of Muslim Marriages Act, provide for custody of children. Here again custody orders are made on temporary and permanent basis by the court.

Temporary or Interim Orders

While the matter is pending in court, a judge will make arrangements allowing one parent to have custody of the children. Visitation rights or

access is given to the other parent even if he or she is at fault. There are no rules for granting custody. The court will look at the welfare and interest of a minor child in granting custody. If the children are old enough their wishes are considered by the court. Usually custody of very small children is given to the mother as she is considered necessary for nurturing the child. Under Hindu Law, custody of minor children below five is with the mother. The parent who has been granted custody by court, cannot remove the child from the jurisdiction of the court except with the permission of the court.

Access

Although the matrimonial statutes do not have specific provisions for access, courts do grant access to the parent who does not have custody since they have the power to pass orders for custody.

The court will not normally give access to a parent who has been abusing the child. If both parents have abused the child, the court has powers to appoint another person who will take care of the child as the guardian.

Forcible Removal from Custody

Very often when the court grants custody to one parent, the other parent may forcibly try to remove the child.

Steps to be Taken

When a child is forcibly removed from one parent's custody in defiance of a court order, the aggrieved parent must make an application to the court which gave the custody order. The court has the power to arrest or take charge of the child and hand him/her over to the parent in whose favour the custody order has been made. The parent who has violated the court order can be punished for contempt of court. If the mother fears that the father may leave the country with the child, she must apply to court for an order impounding his passport or for an order restraining him from leaving the country. A writ petition can also be filed in a High Court asking for the child to be produced in court, in cases where the child's whereabouts are not known. The court will direct the police or any investigative agency to search for the child and produce him/her in court.

Can Custody/Access Orders be Changed?

If circumstances change, applications for changing the custody/access orders may be made to the court which passed the orders. Some of the reasons when an application for changing the order may be made by the non-custodial parent are:

1) The parent who has custody remarries. 2) The parent who has custody goes abroad or leaves for another place where the other parent cannot avail of access. 3) The child who is sufficiently mature expresses a desire to live with the other parent.

Permanent orders of custody can also be changed by the court when an application is made to it.

The court usually grants custody to the parent who has the child at the time of going to court. The factors taken into consideration by the court are the age of the child, the wishes of the child, the home environment, the school the child is going to, the wishes of the parents and the fitness of the parents both physically and psychologically. Even a mother who has no income of her own can claim custody and also claim maintenance for supporting the child.

Under the Indian Divorce Act which applies to Christians, the court also has the power to make arrangements for placing children under the protection of the court.

Guardianship

Hindus are governed by the Hindu Minority and Guardianship Act, 1956. Others are governed by the Guardians and Wards Act, 1890 or by Personal Law. A guardian is a person who has the care of the person and property of a minor. Under Personal Law the father is usually deemed to be the natural guardian of the minor child. However, in an application for custody the courts do not as a matter of right, give custody to the father. If a woman wants to make an application for custody without filing matrimonial proceedings, she can do so under any of the above two laws, depending on whether she is a Hindu or a non-Hindu. Obviously the father or any other relative can also make an application for guardianship of the child.

In one case, a father had left the infant with his wife's mother, after his wife died. After several years the father claimed custody of the child. The court refused him custody as the child had been continuously looked after with love and affection by the grandmother. The court allowed the father to visit the child.

Jurisdiction

An application for guardianship must be made to the court where the child normally resides. Wherever there is a Family Court an application must be made to that court.

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Rishi Reddy

Maintenance Provisions Under Personal Laws

MOST OF THE UNSATISFACTORY HOLDINGS are a result of the theory under which courts award alimony with regard to maintenance. Most courts award maintenance as a subsistence payment to a divorced woman who has no other means of survival. Instead, courts should recognise that maintenance is payment for the economic partnership that existed between the spouses for the duration of the marriage.

A survey revealed that in Indian society, Hindus make the most use of Family Law for the settlement of domestic disputes. More than 90 per cent of the cases brought with reference to espousal maintenance were under Ss. 24 and 25 of the Hindu Marriage Act or S. 18 of the Hindu Adoptions and Maintenance Act. Most of the remaining cases were brought under the Indian Divorce Act or the Special Marriage Act, with cases under the Parsi Marriage and Divorce Act constituting less than 1 per cent of cases. Muslim Personal Law remains silent on the issue of maintenance.

A controversial addition to the laws applicable to Muslim women was passed in 1986, viz., the Muslim Women's (Protection of Rights on Divorce) Act. Section 3 of the Act gives Muslim women a right to be maintained by their husbands after divorce. Much controversy surrounds the general maintenance provision in Sub-section (a). It states that "a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband". Some courts have construed this provision to mean that the former husband must make a monthly payment of alimony only for the period of *iddat*. Other courts have interpreted this statute as requiring the husband to pay a lumpsum amount enabling the woman to have financial

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independence (constituting a "reasonable and fair provision") and periodic payment of maintenance during *iddat*.

Interim Maintenance

The vast majority of maintenance applications over the past 15 years were under S. 24 of the Hindu Marriage Act (HMA). Most of these cases were brought by indigent wives. Section 24 of the Hindu Marriage Act requires that an applicant has no independent income, sufficient for her or his support and that the court will use its discretion in awarding alimony "having regard to the Petitioner's own income and the income of the Respondent". The courts have identified a number of influential factors used for assessing an applicant's need for maintenance *pendente lite*. Theoretically, these factors should have no relation to the substantive issues in the main petition. Case law strongly supports the contention that a petition under S. 24 should be decided as soon as possible, so that it remains uninfluenced by the main issues in the case [AIR 1984 P&H 332, AIR 1975 Raj 8 AIR 1917 Del 76, AIR Raj 84]. Even in a case where the factum of the marriage itself is in dispute, the wife has been held to have the right to maintenance *pendente lite* [AIR 1988 Raj 127]. The existence of the marriage should be disproved before the wife loses her right to interim maintenance. The courts have taken this liberal stance because S. 24's purpose is to enable an indigent spouse to litigate a domestic dispute on an equal footing with a wealthy spouse [AIR 1976 Del 246, AIR 1977 Del 76].

However, one situation in which the courts have been untrue to the above rule occurs when the wife's marital fidelity is in question in the main petition. Some courts have firmly upheld the rule and awarded interim maintenance even though there was evidence that the wife was leading an "unchaste life". Unfortunately, other courts have used preliminary evidence of a wife's adultery to reduce the amount of interim maintenance awarded. In *Yogeshwar Prasad v/s. Smt Jyoti Rani*, there was some evidence that the wife was having an affair with a married man. In response to her petition for maintenance under S. 24, the court stated that it could not refuse her interim maintenance altogether because she needed the funds to litigate. However, her behaviour would influence the amount of interim maintenance she would receive.

While the substantive issues of the main petition are theoretically irrelevant for interim maintenance, the courts have identified various factors which directly affect the success of a petition under S. 24. These factors include income of each spouse, needs according to status, family background, customary standard of life, legal and other obligations [1986

Ker 130]. Furthermore, most courts, though not all, have supported the contention that in assessing the amount that the husband must pay to the wife, the court must take into account what the spouses actually earn, and not their potential for earning. There has been an interesting argument representing the opposite view which has also been honoured by the courts. In *Smt Urmila Devi v/s. Hari Prakash Bansal* [1988 P&H 84], the husband filed for divorce and both parties filed for interim maintenance. The court came to the conclusion that neither spouse had sufficient income to support the other. However, the husband was an able-bodied person capable of working and therefore should be liable to pay maintenance to her. The court held that a person capable of working can be considered capable of maintaining his wife and awarded maintenance at Rs 100 per month assuming a minimum labourer's wage as the husband's salary. Thus a husband's duty to maintain his wife forces him to find employment.

Computation Of Income

A substantial amount of law deals with the meaning of the words of the statute "independent income sufficient for her or his support". Most courts interpret "income" to mean net income, but differ greatly in their method of computation of this figure. Some courts have included the amount paid to a provident fund and life insurance premium as part of the net income. Others have excluded that amount, along with taxes and other essential charges in determining net income. Generally, income does not include capital, i.e. land and hereditaments [1986 Guj 8], but does include the yearly return accruing from those assets. The courts agree that "sufficient income" means enough for the wife to live on according to the status and station of her husband: The general rule is that the wife should not be relegated to a lower standard of living than that of her husband [AIR 1987 Raj 159; AIR 1984 Del 320]. Courts agree that another basic requirement is that the claimant spouse has insufficient independent income, i.e., the fact that the wife is supported by parents or relatives does not excuse the husband from payment because the wife is not self sufficient.

Procedural Anomalies

Procedurally, several factors affect an order of interim maintenance. When the husband refuses to reveal his income, suspected to be quite high, the wife's allegations are presumed correct and the husband must disprove any specific claims [1987 Del 43]. Revocation of interim maintenance should not be used to penalise any party who has not complied with any orders from the court, since the purpose of S. 24 is to facilitate litigation for indigent spouses [AIR 1976 Del 246]. Courts agree that even when the main petition is dismissed, a spouse may receive arrears of interim

maintenance for the duration of the proceedings [AIR 1983 Raj 229, AIR 1977 Del 176].

One particularly unfortunate practice of the courts, is suspension of payment of maintenance when proceedings are stayed because of the husband's refusal to comply with the maintenance order. In *Smt Jai Rani v/s. Om Prakash Saini* [AIR 1984 Del 301], the husband who had filed a petition for restitution of conjugal rights failed to pay the maintenance awarded by the court. The judge stayed the proceedings, and declared that the wife was only allowed maintenance from the date of her application to the date the case was stayed. The court reasoned that maintenance was due only when proceedings were before the court. A stay was not considered "proceedings before the court", therefore the wife could not get maintenance for the duration of the stay. In effect the wife would be forced to return to her husband because she has no means of maintaining herself. The husband would have acquired the restitution of conjugal rights without ever having to litigate.

Increasing Amounts Awarded

Courts have constantly increased the amount of maintenance awarded to the wife if she is caring for children who are a product of the broken marriage. Most courts appear willing to do so despite the fact that claimants did not file a petition under S. 26 of the Hindu Marriage Act for maintenance for minor children [AIR 1981 Cal 230; 1988 J&K 22; 1982 AP 100; 1981 J&K 5; 1976 Kant 215 compare with 1982 Cri. 280].

In *Damodharan v/s. Meera* [1987 Ker 78], the court reiterated the popular rationale by stating, "when the wife claims maintenance and has children to support, any interim maintenance to the wife alone is meaningless if it does not provide for the maintenance of children also". However this reasoning seems to be lost when the child is not a product of the marriage, but perhaps the result of the wife's extramarital union. In *Purshottam Das Agarwala v/s. Smt Pushpa Devi* [1982 Cri 270], a situation arose in which the court ruled that the minor child who was said to be not a product of the marriage could not get maintenance because such maintenance was not prescribed under S. 24. The rule does not seem to be in keeping with the purpose of S. 26 of the statute, which is to protect minor children. Instead it punishes the mother for having an adulterous affair.

Permanent Alimony

Permanent alimony under S. 25 of the Hindu Marriage Act differs greatly from S. 24 in the criteria under which it is granted. A most interesting aspect of permanent maintenance is the various theories under

which a court will grant permanent maintenance to an indigent wife. Some have granted maintenance as a subsistence allowance. Some have granted it reasoning that a divorced woman has no position in Hindu society. No courts have awarded permanent alimony on the theory that the marriage was an economic partnership, to which both the husband and wife contributed equally.

Under S. 25, there are several factors which determine whether maintenance will be granted at all. Maintenance cannot be granted when a petition for divorce is dismissed and the marriage continues. As the Delhi High Court explains in *Smt Sushama v/s. Satish Chander*, if a marriage is not dissolved through a divorce decree, then the full responsibilities of the spouse to support the other remain, without any question of alimony.

A most important case was litigated in the Supreme Court in 1983. In *Aruna Basu Mallick v/s. Dorothea Mitra* [AIR 1983, 3 SCC 522], the court ruled that a decree for permanent maintenance is not extinguished upon the death of the husband and is executable against the deceased husband's estate in the hands of his heirs. The rationale for the court's ruling was that to make the decree contingent upon the life of the husband is contrary to the terms and spirit of the divorce decree, which makes maintenance dependent upon the life of the wife.

The existence of children is also an influential factor in the award of maintenance. The courts seem quite willing to give a very nominal amount to legitimate children of the broken marriage. Usually, maintenance includes provisions for education as well as basic necessities [AIR 1988 J&K 22]. The father's responsibility exists until the children are major, married or employed [AIR 1987 MP 57].

A more controversial aspect of permanent maintenance exists with respect to the manner in which conduct of the parties affects amount of the award. The survey of cases reveals that although most courts are hesitant to refrain from awarding maintenance at all when the wife is at fault, the amount of maintenance awarded is painfully low. Often the wife will receive less than Rs 100 per month. In *Gulab Jagdusa Katwane v/s. Smt Kamal Gulab Katwane* [1985 Bom 88], a divorce was granted to the husband because of the wife's infidelity. The court justified its decision to award maintenance by explaining that in our complex society with varying moral codes, one cannot define one proper mode of matrimonial conduct. However, the court awarded only "starving allowance" supporting the contention that the wife is punished for her unfaithfulness, through the award of maintenance. Through most High Courts have followed the above line of reasoning, the Rajasthan High Court has taken a more practical view in *Smt Shantih Devi v/s. Raghav Prakash* [AIR 1986 Raj 13]. In this case,

the Rajasthan High Court argued that despite the fact that the divorce was granted because of the wife's cruelty, her alimony should be a substantial relief to her because a divorced woman has no economic or social position and remarriage in Hindu society is difficult.

"Economic Partnership" Theory Ignored

Despite various progressive rulings and a revision of the statute in 1976, no court has yet supported this "economic partnership" theory behind an order of permanent maintenance i.e., the wife deserves compensation after marital breakdown because of her economic contribution to the marriage, through work inside the home. Under such a theory, a wife would deserve alimony even if she were cruel, unfaithful, or later remarried. Under "economic partnership" criteria, the 1976 revision to the Act is highly unsatisfactory. Prior to 1976, S. 25 stipulated that a court must state in its order, that the Respondent must only pay maintenance to the applicant "while the applicant remains unmarried". In 1976, this requirement was dropped, but the court was allowed, in the event of a "change in circumstances", "to vary, modify or rescind any such order in such manner as the court may deem just". A change in circumstances would include the wife's remarriage. Allowing the court so much discretion in modifying or rescinding its order virtually obliterates any progress the legislature made in removing the remarriage provision.

Hindu Adoption and Maintenance Act

An award under S. 18 of the Hindu Adoption and Maintenance Act fulfills a different function from that awarded under the Hindu Marriage Act. The former Act was meant to aid neglected, abandoned and deserted women who are left with few financial resources, while a marriage is legally in existence. A woman may collect maintenance and live apart from her husband if she can prove that she lives apart for a good cause. Under the Hindu Marriage Act, the courts take attendant circumstances into consideration, including the incomes of both the parties. In several ways the courts have construed this statute quite liberally in favour of destitute wives. In *Raghavan Radhakrishnan v/s. Sathyabhama Jayakumari* [AIR 1985 Ker 193], the Kerala High Court ruled that in order to collect maintenance the wife need not show that the husband had an animus for desertion. The court explained its decision by arguing that legislative intent embedded in the Hindu Adoption and Maintenance Act was to help the deserted and neglected wife. Requiring proof of animus would be counter to this intent to protect women. In *C. Obula Kanda Reddy v/s. C. Pedda Venkata Lakshamma* [AIR 1976 AP 43], the Andhra Pradesh High Court decided that a second wife whose marriage was void because the first wife was still

living, should be entitled to maintenance under the Hindu Adoption and Maintenance Act. The court construed the words "Hindu wife", in S. 18 of the Act to mean one whose marriage was solemnised. If read otherwise, the court held that S. 18 would be useless in the protection of deserted women.

In addition to these liberal interpretations of the statute, S. 18(g) provides courts with the power to use their discretion in assessing whether any situations not specifically provided for in the Act provide a good cause for the wife to live alone [AIR 1987 Kan 209; AIR 1987 Mad 224].

The right of a wife to claim maintenance flows from the Hindu Adoption and Maintenance Act, when a *prima facie* case of the existence of the marriage is established. The right of maintenance is a day to day right which exists between the married couple. In *Dattu Bhau Undage v/s. Tarabai Dattu Undage* [AIR 1985 Bom 104], the wife was awarded maintenance of Rs 300 if the husband would provide separate residence. The husband defaulted and the wife was forced to resume cohabitation. The Bombay High Court ruled that the resumption of cohabitation did not nullify the decree for maintenance, which was a manifestation of the wife's right to maintenance.

Despite these liberal interpretations, some disturbing rulings have been handed down by the state High Courts. In *J.P.K. Natesan Chattar v/s. Achiyaygee Ammal* [AIR 1975 Mad 202], the husband was cruel to his first wife, and married again after she left him. The first wife came forward with a suit for maintenance 17 years after she left him, claiming 6 years in arrears and future monthly maintenance payments. The husband claimed that she had either abandoned him, or waived her right to claim maintenance from him. The court ruled that because the husband had believed that the wife had abandoned her right, he need not pay 6 years in arrears. The court awarded the wife 1 year in back maintenance and future monthly payments. Such rulings, based on the beliefs of non-claimant spouse, leave themselves open to spurious allegations and easily enable a husband to say that he believed he owed his wife nothing at all. They are also contrary to the philosophy behind the Hindu Adoption and Maintenance Act itself, which is a legal manifestation of the Hindu concept of the duty of maintenance between spouses.

Another unsatisfactory aspect of S. 18 rulings is the extremely low amount of maintenance awarded. Most awards are under Rs 100. In assessing the amount of the award, courts depend heavily on the determination of income of the spouses. Most income in Indian society is unreported, leaving a great discrepancy between the actual standard of living and income reported. A more just manner of ascertaining what a neglected wife's maintenance is would depend upon the husband's stan-

dard of living, rather than on reported income. The wife's maintenance award should be able to match her husband's standard of living.

Indian Divorce Act

The language of the Indian Divorce Act differs greatly from that of The Hindu Marriage Act. Such a comparison reveals also that the Indian Divorce Act should be revised in certain areas. Under the Indian Divorce Act, as under the Hindu Marriage Act, one of the factors influencing grant of permanent maintenance is the conduct of the parties. However, quite different from the Hindu Marriage Act, courts adjudicating under the Indian Divorce Act must also take into account the wife's fortune, and the earning ability of the husband. Secondly, the court has specific power to suspend payments if the spouse is unable to pay.

The provisions of the Indian Divorce Act, which are particularly detrimental to women are Ss. 38 and 39. Section 38 enables the court to appoint a trustee for the wife to whom maintenance payments shall be made. Such a provision in effect treats a woman like a child, preventing her from having complete control of her personal finances. Section 39 of the Act enables a court, upon a finding of a woman's unfaithfulness, to partition out the property of the wife for the benefit of the husband and children. Such an unusual provision enables a court to punish adultery, so that a woman's economic condition depends upon her sexual behaviour.

The main difference with reference to interim maintenance between the Hindu Marriage Act and Indian Divorce Act is that the Indian Divorce Act sets a ceiling on the amount of maintenance at one-fifth of the husband's income. This provision seriously handicaps the wife's ability to litigate because of her lack of resources.

Case law shows that courts have been strictly adhering to the rule prescribed by the statute, awarding the wife one-fifth of the husband's average net income of the preceding three years [AIR 1984 Ker 23; AIR 1988 Or 195].

Parsi Law

The Parsi Marriage and Divorce Act is a virtual reproduction of the Hindu Marriage Act. The only area in which it differs is S. 41, which parallels the trustee provision of S. 38 of the Indian Divorce Act with the same detrimental effects. The Parsi Marriage and Divorce Act was revised in 1988, to include either the husband or wife as the applicant for maintenance. Before 1988, only the wife was specified as an applicant.

The maintenance provisions under the Special Marriage Act are similar to those under the Hindu Marriage Act in criteria and procedure. However,

the Special Marriage Act identifies only the wife as an applicant for maintenance.

General Characteristics

A survey of maintenance cases over the past 15 years reveals some general characteristics of Family Law under various Personal Laws. Different principles govern the criteria under which interim and permanent maintenance is awarded. The courts seem more willing to award maintenance under the Hindu Adoption and Maintenance Act. All provisions for permanent maintenance are dependent upon the conduct of the parties. In Indian society, since men are primary earning members in the majority of households, this means that permanent maintenance depends upon the conduct of the wife during and after marriage. Conduct theory punishes a woman for infidelity during marriage and requires her to be faithful to an ex-husband after the marriage is dissolved. In effect, it controls her sexual behaviour long after the relationship with her husband ends. Instead of such moralistic controls in our law, maintenance payment should be seen as entitlements or contributions to the marriage. The manner in which to begin a trend towards such thinking would require that the statutes contain entitlement ideology as a clear theoretical basis. Criteria for the award given to the woman in return for her economic maintenance should include such factors as length of the marriage, the wife's sacrifice for the marriage in terms of employment opportunities, the number of children as a result of the marriage and which spouse is caring for them. Such criteria correctly weigh only the economic aspect of the marriage in deciding the economic arrangements after marriage. Only when such factors become the deciding criteria will women cease to be unduly punished upon the breakdown of marriage.

(From, *The Lawyers*, July 1991).

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Aparna Bhat

Hindu Women's Right to Maintenance

THE HINDU ADOPTION and Maintenance Act was brought into force in the year 1956. Section 18 of the Act reads as under:

Section 18: Maintenance of wife.

(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life-time.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance:

(a) If he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

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In a nutshell, S. 18 can be summarised thus: A Hindu wife is entitled to be maintained by her husband during her lifetime; she can claim separate residence without forfeiting her right to maintenance when the husband is guilty of deserting her without reasonable cause, he has treated her with cruelty, if he has another wife living and if there is any other cause justifying her living separately. Thus, the right to maintain a wife is a statutory obligation.

The Right to Maintenance

Clause (1) of S. 18 says that the Hindu wife is entitled to be maintained by her husband during her lifetime. A husband is personally liable for his wife's maintenance as long as she is alive and in cases where the husband dies before the wife, there has to be a proper provision made for the widow's maintenance. The right of a wife for maintenance is incident to her status, and a Hindu husband is under a legal obligation to maintain his wife as held in *Udaynath v/s. Siri Devi* [AIR 1973 Ori 196]. It was further held that this obligation was personal in character and arises from the very existence of a relationship between the parties. The right of a Hindu wife exists independently of the question as to whether the husband is in possession of any property or not.

As the right to be maintained is absolute, irrespective of the fact whether the husband owns any property, the right of a wife may automatically be enforced against the property in possession of her husband. In ABS *Krishna Kumari v/s. Varalakshmi* [AIR 1976 AP 365] it has been held that "the right of maintenance of a wife creates a shadow on the properties of her husband and it gets embedded in the properties not only which he owns at the time of marriage, but also which he acquires subsequently".

It is to be noted here that only a woman who enjoys the legal status of a wife is entitled to claim maintenance. In *Krishan Sakharabai*, [1988 (1) Divorce and Matrimonial Cases 60], it was held that S. 18 does not entitle a woman to claim maintenance from a person with whom she has entered into a void marriage.

Right of Wife Against Third Party Transferee

Although the Hindu wife has a right to maintenance, her husband may try to defeat the right by alienating his property in favour of a third party. In such cases, the wife is not helpless. Under certain circumstances, she can follow the property in the hands of the transferee. It is in this context that S. 39 of the Transfer of Property Act reads:

"Where a third person has a right to receive maintenance...from the profits of immovable property and such property is transferred, the right

may be enforced against the transferee for consideration and without notice of the right nor against such property in his hands."

If the provisions of S. 39 are satisfied, the wife can enforce her right against a third party in whose favour the property is transferred.

The Transfer of Property Act was enacted in the year 1882. The principle underlying S. 39 of this Act then was that the claimant had to establish the mala fide intention of the transferor/transferee to take the benefit of the section. In 1939, S. 39 was amended and thereafter it is not necessary to prove an intention to defeat the right. Proof of notice of the existence of the right is sufficient to claim maintenance from property in the hands of the transferee. Thus, if the provisions of S. 39 are satisfied, a wife can claim maintenance against a third party in whose favour the property has been transferred.

In order to attract S. 39 the wife would have to prove that she is entitled to be maintained from the profits of immovable property. The question arose for decision in *Chandramma v/s. Venkata Reddi* [AIR 1958 AP 396]. The court held that a Hindu wife has a "subordinate interest" in her husband's property:

"The Hindu Law texts and the important commentaries impose a legal personal obligation on a husband to maintain his wife irrespective of his possession of any property, whether joint or self-acquired. They recognise the subordinate interest of the wife in her husband's property arising out of her married status. They also prohibit the alienation of properties by the husband which has the effect of depriving her and other dependents of their maintenance. They further treat her as a member of a Hindu joint family entitled to maintenance out of joint funds."

Thus a Hindu wife has a right to be maintained out of the profits of her husband's immovable property within the meaning of S. 39. She can therefore follow the property in the hands of a gratuitous transferee or a transferee with notice. Courts in such cases will be willing to create a charge on the property.

In *Manickyan v/s. Venkayamma*, [AIR 1957 AP 710] the husband was given to bad ways. The wife filed a suit for separate maintenance against her husband and against his mother, in whose favour the husband had transferred the property gratuitously. The court held that the wife was justified in living separately, ordered payment of maintenance and created a charge on a portion of the property in the hands of the mother. The mother appealed to the High Court contending that the wife could not follow the property in her hands. Rejecting the contention the court held "the right of the wife and minor children would be illusory if a man were free to wantonly

dissipate his wealth, reduce himself to pauperism and thereby deprive his wife and children the means of subsistence. Though the smritikars and commentators encouraged and exhorted gifts to deserving persons, they also condemned and prohibited in unequivocal terms gifts of property to such an extent as to deprive a man's family of the means of subsistence. Some of the texts bind a man's conscience and make it sinful for him to deal with his property in such a manner as to jeopardise the maintenance of his family." It was also held "if the property from which a wife or widow has a right to claim separate maintenance is alienated for the purpose of defeating the right, and the alienee has notice thereof, the alienation would be a fraud upon persons whom the Hindu Law regards as deserving of special protection and a violation of the precept which prohibits alienation of that which is media for the sustenance of the family and would therefore be subject to the maintenance right."

In *Laxmi v/s. Krishna Bhatta* [AIR 1968 Mys 288] the husband had taken a second wife. His first wife Laxmi and her daughter filed a suit to claim separate maintenance. The husband had executed a document in favour of his mother, transferring his property to her without consideration. The munsif judge granted separate maintenance, held that the transfer to the mother was intended only to defeat their claim and created a charge on the property in the hands of the mother. The mother appealed to the subordinate judge who removed the charge. On appeal by Laxmi to the High Court, the court held that the charge was rightly created and restored it.

Another interesting case on this aspect is *Vedavathi Williams v/s. Rama Bai and Ors.* [AIR 1965 Mys 265] The question was whether the creation of a charge on property makes the transferee of that property liable for enhanced maintenance to be provided at a later stage. The court observed he could be and held that the transferee would be liable as long as he had knowledge of an existing right of maintenance.

In this case there was a charge created in favour of the wife for existing maintenance. The property was purchased by the defendant with the knowledge of the existing interest. Subsequently the wife became entitled to enhanced maintenance. The question arose, whether the purchaser would be entitled to enhanced maintenance.

The court held "it seems to me that the position would be the same even in respect of the right of the plaintiff to claim enhanced maintenance ...The right to receive maintenance about which this section (39) speaks of is not only the right to receive maintenance in the first instance but also the right to receive enhanced maintenance which may be claimed if there is a material change of circumstances."

It should be noted here that a charge is to be created for the effective enforcement of her right to claim maintenance. When that right has been jeopardised by the conduct and dealing of the husband or father with reference to his properties, the court can create a charge on a suitable portion thereof securing the payment of maintenance. By virtue of S. 39 of the Transfer of Property Act the wife can follow the property not only in the hands of the husband or father, but also the properties transferred by him either gratuitously or to a person having notice of the right to maintenance, and the court can create a charge on such property.

Right to Separate Residence

Section 18(2) provides for a wife to live separately and to claim maintenance when the husband is guilty of desertion, or has treated the wife with cruelty, or is suffering from a virulent form of leprosy, or has any other wife living, keeps a concubine in the same house in which his wife is living, or has ceased to be a Hindu by conversion or for any other cause which would justify her living separately.

Desertion

Section 18(2)(a) provides for a wife to live separately from her husband when he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or wilfully neglecting her. On the face of it, it appears that a wife can claim relief under this section when her husband has deserted her.

The Supreme Court made an indepth observation in this context in *Bipin Chander Jaising Bhai Shah v/s. Prabhavati* [1956 SCR 839 at 849]. "What is desertion?" Rayden on *Divorce* -- which is a standard work on the subject -- at pg. 128 (6th Edn.) has summarised the case law on the subject in these terms:

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party."

The legal position has been admirably summarised in paras 453 and 454 at pgs. 241 to 243 of Halsbury's *Laws of England* (3rd Edn.) Vol 12, in the following words:

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life

involved, the court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

"Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

"The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

"Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offense of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid."

Therefore, if one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease to have any marital obligation and leaves the wife and that of a man who with the same intention compels his wife to leave him on account of his conduct.

Cruelty

Cruelty may be physical or mental. The modern view is that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. In *Maharaja Nadar v/s. Muthukani Ammal* [AIR 1984, Mad 376], the court held that accusing a woman that she is a "barren lady" would amount to cruelty. It was observed that "the legal conception of cruelty" comprises two distinct elements: firstly, the ill treatment complained of and secondly, the resultant danger or apprehension thereof. In *Jameson v/s. Jameson* [1952 (AC) 525 at 545], it was held that it would be inaccurate and liable to lead to confusion if the word "cruelty" is understood apart from its effect on the victim. The apprehension contem-

plated by the above legal conception is that further cohabitation will be harmful or injurious and not that the same or similar acts of cruelty will be repeated. Where the acts or conduct can be said to amount to cruelty it is immaterial that there is no danger of its repetition. The inquiry must be whether the cruel treatment established by evidence is of such a nature as to cause in the mind of the victim reasonable apprehension that it will be harmful or injurious to live with the other party.

The Supreme Court considered this aspect in *N.G. Dasten v/s. Sucheta* [1975 (3) SCR 967]. It was observed that the question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse. "That which may be cruel to one person may be laughed off by another and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."

The general principle underlying "cruelty" has been that the guilty spouse should be found to have been acting in such a way as to inflict any type of injury to his spouse. This may be directly injurious to her or may affect her indirectly i.e. when the husband hurts/injures the children or relatives of the wife, it will have the effect of injuring the wife and hence will amount to cruelty. (See *Trimbak Narayan Bhagwat v/s. Kumudevi* [AIR 1957 Bom 80].)

Another interesting observation was made by the Allahabad High Court in *Gopal v/s. Mithilesh* [AIR 1979 All 316] wherein the husband was found guilty of cruelty as he used to keep quiet when his wife was constantly criticised and nagged by his mother. Unusually callous behaviour or neglectful behaviour or deliberate harassment of the spouse would amount to cruelty. If a husband accuses his wife of being unchaste it can be "cruelty" within the meaning of S. 18. Demand for dowry, and compelling the wife to lead an immoral life so as to gain money would amount to cruelty.

Leprosy

Section 18(2)(C) entitles a wife to claim separate residence when her husband is suffering from a virulent form of leprosy. This provision is outdated and unjust as today leprosy is no longer a dreaded disease and is curable.

Other Wife/Wives Living

Section 18(1)(a) provides for separate residence for a wife when the husband has any other wife living. The clause says that whenever a Hindu husband has any other wife living, she can claim separate residence. This

can be claimed irrespective of the fact that the wife had consented to the second marriage of the husband. She can also claim separate residence and maintenance from her husband even when the other wife is not living with the husband. The clause is not of much relevance today as the Hindu male can no longer marry more than one wife after the Hindu Marriage Act, 1956 and bigamy is an offense under the IPC.

Keeping a Concubine

Clause (c) of S. (2) of S. 18 provides that a wife can live separately from her husband and yet claim maintenance when the husband has a concubine living in the same house or habitually resides with a concubine elsewhere.

In *Maharaja Nadar v/s. Muthukani Ammal* [AIR 1986 Mad 346] the wife had approached the court, as the husband had another wife, claiming maintenance with separate residence. Although the wife could not establish that there was a second marriage the court granted her separate residence as the husband was anyway guilty either under clause (a) or (e).

Ceased to be a Hindu

When the husband ceases to be a Hindu by conversion to any other religion, the wife under clause (f) of S. 18(2) can claim separate residence and maintenance.

Any Other Cause

Clause (g) of S. 18(2) provides for a wife to claim separate residence with maintenance when there are other grounds for claiming maintenance and separate residence which are not specifically provided for. The clause which is an inclusive one provides for including in the ambit of S. 18(2) causes which are justifiable for the wife to claim separate residence but not provided for specifically in the statute.

It can be invoked in those cases where the wife has grave and serious reasons to live separately from her husband and other clauses do not provide for it e.g. it may be the case of a wife where the husband does not comply with the direction of restitution of conjugal rights or it may be a case where the husband is given to drinking which may not amount to cruelty. This clause is to be applied within the ambit of a reasonable person (wife) who feels that there are serious reasons for claiming separate residence.

Wife Unchastity

Subsection (3) of S. 18 has a negative aspect on the whole issue as it deals with cases where a wife cannot claim maintenance.

An unchaste wife, or a wife who has ceased to be a Hindu by embracing another religion would not be entitled to maintenance.

Quantum Of Maintenance

Maintenance is normally estimated considering the following:

1) Reasonable wants of the woman;

2) Her position in life;

3) Her husband's means and income; and

4) The mode of the former life of herself and her husband.

As the maintenance is claimed from the husband's means of income and assets, a detailed scheduled of all the property owned by the husband has to be given by the wife in her application. The fact that the wife has property of her own would not have much effect on the maintenance that she can claim though that would be a relevant consideration for the courts in deciding the quantum of maintenance. However it is only the wife's actual income which will be taken into consideration and not her capacity to earn. The wife should also specify as to how many dependents she has and what would be their needs and expenses. Marriage expenses of the children can also be claimed in the maintenance.

It was observed in *Manickyam v/s. Venkayamma* [AIR 1957 AP 710] that when a husband fails to comply with the direction of the court in paying maintenance putting him in prison can be one of the solutions available to her.

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Danial Latifi

After Shah Bano

THE RECENT DEATH, at Indore, of the aged Shah Bano Begum has briefly flashed back into the public consciousness her case that occupied so much space in the press a few years ago. Many people outside the Muslim community and some within it are still puzzled. What is the upshot of it all? How do matters stand now? What are the precise rights of a divorced Muslim wife vis-a-vis her ex-husband in the matter of alimony? What are the effects of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Unfortunately, no clear cut answer can be given. This matter was personally handled by Mr Rajiv Gandhi with his monumental ineptitude. Whatever else he managed to do with his perhaps well-intentioned bungling, he certainly ensured the unhappy and needy divorced Muslim women several years of litigation. This question must surely come up before the legislature or the Supreme Court before long.

The last occasion when the Family Law of Muslims was seriously amended was when the Dissolution of Muslim Marriages Act, 1939 was unanimously passed by the legislature after being fully discussed by a joint select committee of parliament over a period of three years. That statute gave Muslim women the statutory right to claim divorce from the court on various grounds such as cruelty, desertion and "any other ground recognised by Muslim Law".

The latter has now been judicially interpreted to include breakdown of marriage without attributing fault to the husband. This statutory change was achieved by importing the principles of the Maliki school of Muslim Law into the law as administered in India. There was also a reaffirmation by the legislature of the old rule that in a Hanafi case (as are the majority of cases here), it is permissible to import, on grounds of equity, the principles of the Maliki Shafeite or Hanbali schools of Muslim Law.

This statute of 1939 put Muslim Law ahead of Hindu Law for some years. Hindu women had to wait till after 1955 to obtain similar rights of divorce.

It is unfortunate that the admirable procedure followed by the legislature in 1939 by incorporating the Maliki (Muslim) Law to benefit all Muslim women, could not be followed in 1986 by Mr Rajiv Gandhi.

It may be argued that S. 3 of the Act of 1986 does attempt precisely that when it requires that the court shall order that a reasonable and fair provision shall be made and paid to her (the divorcee) by her former husband. But here alas Mr Rajiv Gandhi has shown the cloven hoof, because it is left unclear in the statute whether this amount of fair provision like that of maintenance shall be calculated only in respect of the *iddat* period or for the whole of the woman's life.

Some *ulema*, and the eminent Islamic scholar and former editor of *The Radiance*, Syed Aminul Hasan Rizvi, who is also a lawyer, have held that this fair provision must be calculated with reference to the whole of the woman's life. That would appear to be just and reasonable. Such a view has been followed by the Gujarat and Kerala High Courts [AIR 1988 Guj 141; 1988 2 KLT 94].

But alas, a judgement of the full bench of the Andhra Pradesh High Court, whose leading judgement was delivered by Sardar Ali Khan J., following the opinion of a careerist Delhi Professor of Law with unstable views, has taken the opposite view and held that the fair provision for the woman, like her maintenance, must be calculated with reference only to the *iddat* period. That would be giving next to nothing to the hapless woman. It is for the Supreme Court to clarify which of these two views is correct.

Due to the intemperate speech of the unfortunate Mr Zia-ur-Rehman Ansari (then central minister), approved by the then prime minister, and the fall-out thereon by inspired demonstrations on the streets, the Supreme Court is now too frightened of the apprehended Muslim reaction to hear the case. Fortunately, the High Court decisions have evoked no such response as timorous souls among the judges apprehended. It seems highly doubtful whether Muslim opinion would react adversely to a proper determination of this issue by the Supreme Court. The Supreme Court awaits the lead from another Krishna Iyer, which alas seems lacking.

Meanwhile, the unfortunate divorced Muslim women suffer untold miseries. Justice Sardar Ali Khan, Dr Tahir Mahmood and others of the same school of thought have forgotten the dictum of the Prophet Mohammed who spoke as follows:

(in the Persian rendering)

betars az aah e mazloom
aan az aan arsh e khudaa larzad

heed the cry of the oppressed;
for these shake the very Throne of God.

(From, *The Lawyers*, October 1992).

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Danial Latifi

Women, Family Law and Social Changes

SINCE INDEPENDENCE there have been significant changes in the status of women and in economic and social life along with changes in Family Law that have reflected social changes. These changes have not been as far reaching as some might have desired. But slowness in such matters is to be expected. The dead weight of centuries is not easily put aside. For example, the Hindu joint family is still a dominant reality, especially in the countryside.

Ironically, Muslim women in the countryside are still governed by unreformed Hindu Law, which denies them all inheritance rights although their Muslim sisters in the towns were given property rights in 1937 by the Shariat Act. These rights are in general only half those enjoyed by men. As against this, their Hindu sisters under the legislation of 1954, now have equal inheritance rights with men in respect of all their property, including agricultural land. To what extent they actually enjoy these rights is still questionable.

The extremely slow and unsatisfactory functioning of the courts is another feature of the Indian scene. This is a major reason blocking progress and is one of the main reasons adduced by thoughtful representatives of Muslim opinion against extension of the Uniform Civil Code, enjoined as a directive principle of state policy under the Constitution of India. The administration of Muslim Personal Law (especially in the field of marriage and divorce) largely takes place outside the state courts and without state interference. Although this factor sometimes works against women, the bulk of Muslim opinion still resists change in this direction.

Fundamentalists Resist Reform

Important changes in Hindu Law were made in 1954 and 1955 by

legislation. An effort was made in the 1980's to bring Muslim Law into closer conformity with local modern needs and in particular to improve the position of divorced Muslim women. Hitherto, Hanafi Law as applied and understood, left a divorced woman almost without remedy except what she inherited from her family or could gain from her husband by virtue of the contractual amount of *Mehr* fixed for her in her marriage contract. Although the amount of *Mehr* fixed in some families in the past was large enough, in modern times this has dwindled to a meagre amount with the twin mischief of rendering divorce too easy for the husband and leaving the woman unprotected for the rest of her life. In the case of older women this could be torturous and even the Pakistan Commission on Family Laws, presided over by Justice Abdur Rashid recommended a provision for maintenance for life (or until remarriage) for the divorced woman from her husband. This was sought to be achieved here by an amendment to the Code of Criminal Procedure (by inserting Ss. 125-127) that made it obligatory for a divorcing husband to provide maintenance for his divorced wife unless she remarried, if she was needy, up to a limit of Rs 500 per month.

In a number of decisions, culminating in the famous *Shah Bano* case, (1986) the Supreme Court of India held that these provisions applied also to Muslim women.

However, some misconceived and unfortunate rulings by some *ulema,* reinforced by certain misguided "intellectuals" were exploited by opportunist politicians seeking to create a Muslim vote bank. In actuality, the agitation was a storm in a tea cup, but was mistaken by some as a serious agitation by the Muslims. It is notable that in West Bengal, where the chief minister openly supported the Supreme Court ruling, Muslim support to the ruling party was unshaken. The same cannot be said for the over-smart group, advised by vested interests to play the role of a reactionary puppeteer to manipulate the decadent and opportunist elements to support the diabolical game plan to introduce the legislation known as the Muslim Women (Protection of Rights on Divorce) Act, 1986. Those who supported this Act deservedly lost Muslim support in the next elections.

The Act, under the subterfuge of allaying the apprehensions of so-called liberal elements, fooled the latter by insisting that the position of Muslim women was not worsened by the Act; whereas the Act was so dubiously phrased that it guaranteed several years of litigation to the unfortunate divorced and helpless women, thereby nullifying all the supposed gains.

Fortunately, the Kerala and Gujarat High Courts gave sensible and useful decisions, notwithstanding the Act, keeping women's rights virtually unchanged. But unfortunately, all judgements have not gone that way

and the Supreme Court has put off its own ruling in the matter.

Adverse Interpretation

The Andhra Pradesh High Court Full Bench has recently decided by a 2-1 majority, an important question relating to the Muslim Women (Protection of Rights on Divorce) Act, 1986 — alas, adversely to women. The leading judgement of Sardar Ali Khan J. with which Ramanuluju Naidu J. concurred, in the case reported as *Uman Khan Bahmani v/s. Fatihmunnissa Begum* [AIR 1990 AP at pg. 225], has held that a divorced Muslim woman, under the said Act is entitled to "reasonable provision" only to the extent that the same would avail her during the period of *iddat*. It was not in dispute that the other amount, viz. maintenance, also due to her from the divorcing husband, could be ordered to be paid only for the said period of *iddat*.

The said judgement deserves notice because it is not only contrary to the trend of judicial decisions and renders the statutory provision challengeable as impugning Article 14 of the Constitution of India, but is contrary to established Muslim Law as laid down in the *Shah Bano* case and not changed by the legislature.

Correct Interpretation

The dissenting judge, Bhaskar Rao has correctly interpreted the word "provision" in the said Act in conformity with the definition in Webster's New International Dictionary, which says it means: "a gift by will or deed to one as heir who would not be heir otherwise". He has also relied on the meaning of the said word "provision" given by the Supreme Court in the *Metal Box Company* case [AIR 1969 SC pg. 612] which is as follows:

"An amount set aside out of profits and other surpluses, not designed to meet a liability, contingency, commitment or diminution in value of assets, to exist at the date of the balance sheet is (not) reserve but an amount set aside out of profits and other surpluses to provide for any known liability to which the amount cannot be determined with substantial accuracy, is provision."

Bhaskar Rao J. continues,

"The word provision, thus means an amount set apart to meet a known liability, the amount of which cannot be decided with accuracy. The known liability under S. 3(1)(a) of a husband is to provide for the future of the divorced Muslim woman. The amount is not capable of being decided with substantial accuracy. This provision is thus surely different and distinct from maintenance due to the divorced Muslim woman for the *iddat*

period." [See AIR 1990 AP loc. cit. pgs. 225, 246].

Bhaskar Rao J. has rightly drawn a distinction between the expressions "reasonable and fair provision" and "maintenance" used in Ss. 3 and 4 of the Act. [see loc. cit. pg. 245].

He has also, with respect, rightly scouted the argument based on alleged inconvenience of the view he is taking. He has pointed out: "It is also crucial to notice that the legislature cannot be said to be not appreciative of this inconvenient situation not only in arriving at but also in making a reasonable and fair provision. Having been apprehensive only, it introduced S. 5 in the statute to enable the parties to choose governance by Ss. 125-128 of the Code of Criminal Procedure." [ibid]

Consonance With Muslim Law

One may add that the view taken by Bhaskar Rao J. is totally in consonance with the classic view of Muslim Law taken by the great jurist of the Sunni Law, Imam Shafei, as recorded by the famous commentator, Ibn Katheer, who died at Damascus in the year A.C. 1373 (*see p.220*).

Imam Shafei's opinion becomes particularly relevant and important in view of the statement of Muslim Law unanimously adopted by the legislature in 1939 and set forth in the statement of objects and reasons of the Dissolution of Muslim Marriages Act (VIII of 1939).

"The Hanafi jurists have however clearly laid down that in cases in which the application of the Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafei, or Hanbali law" (emphasis added) [See AIR Manual 4th Ed. Vol 15 pg. 680, Gaz. of India, 1936, pt.5 pg. 154].

Creating Prejudice

The learned judge who has delivered the contrary (majority) opinion has, it appears, been unduly influenced by the view taken by Dr Tahir Mahmood expressed in the Islamic & Comparative Law Quarterly which he edited and which he elaborated in his famous article in the *Hindustan Times* dated 2 October 1985, wherein he has purported to compare and contrast two judgements of the Supreme Court, namely *Krishna Singh v/s. Mathura Ahir* and the *Shah Bano* decision. This article has unfortunately been widely read, reproduced and translated into Hindi and other languages and created the illusion that Muslim institutions were somehow given discriminatory treatment by the Supreme Court.

This naturally created a resentment against the Supreme Court and tended to vitiate, in Muslim eyes, the credibility of the decision in *Shah*

Imam Shafei's Ruling on AlQuran II.241

[Commentary on the Holy Quran by Ibn Katheer (d. 1373 A C Damascus)]

Regarding the Ayat
"AND FOR DIVORCEES
REASONABLE PROVISION
IS DUE FROM
THE RIGHTEOUS"
Said Abdur Rahman
bin Zaid bin Aslam
"When God revealed
the Ayat
'REASONABLE PROVISION
IS DUE FROM
THE KINDLY' (II.236)
someone said
'If I wish to be kind
I may pay and
otherwise not.
Then God revealed
this Ayat:
'AND FOR DIVORCEES
REASONABLE PROVISION
IS DUE FROM
THE RIGHTEOUS'" (II.241)
And because
of this Ayat
a group of scholars
hold MATAA obligatory
in all cases
whether
of divorce by delegation
or of Mahr paid
or of those divorced
before consummation
or those after consummation
so held

Bano's case. Coming ostensibly from a reliable source, the article was widely translated and helped, temporarily, to create widespread and sometimes intemperate and misconceived resentment against the decision. As the Andhra Pradesh judgement shows, the influence of this erroneous view is still widespread. It is thus necessary to examine it in some detail.

In *Krishna Singh v/s. Mathura Ahir* [AIR 1980 SC 707] the Supreme Court held that the Hindu Dharmashastra text, ordaining that a shudra could not become a sanyasi or ascetic, stood abrogated by custom throughout India. Following the Privy Council ruling in *Madura v/s. Muttoo* [1867 (12) Moo Ind Appeals 397], that "under the Hindu system of law, clear proof of usage would outweigh the written text of the law" [AIR 1980 SC 707-719], the Supreme Court held that the relevant Dharmashastra text had been superseded by custom and thus did not merit consideration, application or enforcement in the case before them. The Supreme Court thus upheld the right of a shudra to become a sanyasi and head of the math. The question of declaring the Dharmashastra text repugnant to the Constitution of India thus did not arise. Any lawyer would understand that such was the *ratio decidendi* or crux of the case.

On the other hand in *Mohammed Ahmad Khan v/s. Shah Bano Begum* [AIR 1985 SC 945], the Supreme Court had to apply the statutory mandate contained in S. 2 of the Muslim Personal Law, Shariat Application Act, 1937, which reads:

"Notwithstanding any custom or usage to the contrary, in all questions...regarding maintenance...the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law, (Shariat)."

Thus, by statute, in *Shah Bano's* case, the court was charged to apply the Muslim Personal Law, Shariat, "notwithstanding any custom or usage to the contrary".

Dr Tahir Mahmood's grievance is that the Supreme Court failed to treat Dharmashastra and AlQuran alike! This, he says, is discrimination against the Muslims!

Even the learned, senior counsel for the Muslim Personal Law Board Mr Yunus Salim, rightly did not urge any argument before the Supreme Court such as Mr Tahir Mahmood put forward. Mr Yunus Salim ably and forcefully presented the views of the Muslim Personal Law Board within the permissible parameters of legal argument, which he was entitled to do and to which none could object. Had Dr Tahir Mahmood observed similar juristic restraint none could have faulted him, much as one might differ.

In *Shah Bano's* case the Supreme Court, conforming to the rulings of Imam Shafei and Imam Jafar and the translations of the Holy Quran before

them, held that payment of *mataa* under AlQuran II. 241 is a binding legal obligation upon the husband. Once this is established, then under the Code of Civil Procedure (CPC) Order XX Rule 11 the court may, in execution, order payment by instalments. This being a matter of procedure, is not governed by the Shariat.

But if in *Shah Bano's* case, as Tahir Mahmood suggests, the court had applied the same rule set out earlier, that was followed in *Krishna v/s. Mathura Ahir's* case, that in Muslim Law also "clear proof of usage would outweigh the written text of the law", they would have violated the statute that they were by their oaths, bound to enforce and would also have trampled on the law of Islam.

Our free society certainly permits anyone to argue that the Supreme Court erred. But Dr Tahir Mahmood's charge that the Supreme Court applied "double judicial standards in respect of the scriptures of two different religions" is unsustainable.

Dr Tahir Mahmood's article is a case of *suppressio veri* and *suggestio falsi*, unworthy of a lawyer. The discipline of the law imposes limits on intellectual dishonesty which Dr Tahir Mahmood has exceeded. No man of law, indeed no English reading person who has access to the texts of the statute and of the judgements, could draw the startling and rabble-rousing conclusion that Dr Tahir Mahmood has regrettably done. This has in turn fuelled the fire of Hindu communalists engaged in L.K. Advani's Rath Yatra of November 1990. The geni unleashed by Dr Tahir Mahmood has provoked a counter reaction among the communal Hindus who say that if Muslims can defy the courts why can't we Hindus? Actually it is un-Islamic not to respect the court verdict.

This unfortunate reliance by the learned judge provides the "unexpressed major premise" for his judgement. The learned judge, in defiance of all well known principles of statutory construction, has virtually refused to give due-meaning to the expression "fair and reasonable provision" and has unnaturally constricted the meaning of the expression used in S.3 of the Act, as though the words "fair and reasonable provision" had been deleted therefrom. The said judgement should be reversed by the Supreme Court as soon as possible in the interests of all.

(From, *The Lawyers*, January 1991).

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Shamona Khanna

Challenging the Unequal Position

WHILE DRAFTING THE HINDU CODE BILL in the 1950s, the legislature in its "superior wisdom" decided that the natural guardian of a minor legitimate child shall by law be its father, to the exclusion of all others. The notion of the father as natural guardian was already enshrined in the Guardians and Wards Act, 1890 (GWA) and was presumably based on the popular notion that women are primarily helpless creatures to be protected and sheltered and totally incapable of taking on the responsibility of safeguarding the interests of their own children. Forty years later, the situation is vastly different with more and more women asserting their constitutional right to be equal. The law relating to natural guardianship has become obsolete.

The Law

The GWA contains much of the law regarding guardianship, and is supplemented by the Hindu Minority and Guardianship Act, 1956 (HMGA) which applies to Hindus (*see box on p.224*). Section 6(a) of the HMGA states that the father shall be the natural guardian first and foremost and only then the mother. This right of the father is subject to some limitations:

(i) The proviso to S. 6(a) states that custody shall be with the mother till the child is 5 years old. However, it is important to note that the guardianship of the child always remains with the father.

(ii) The Welfare Principle — S. 13 HMGA states that when declaring the guardian of a Hindu minor, the welfare of the minor shall be of paramount importance. Section 17 of the GWA states that the court shall be guided by what appears in the circumstances to be for the welfare of the minor. Section 17(2) enumerates what factors should be taken into account in determining the welfare of the minor, and S. 17(3) caters for the preference of the minor.

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Hindu Minority and Guardianship Act, 1956.

Section 6. Natural Guardians of a Hindu minor. — The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are —

a) in the case of a boy or an unmarried girl — the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

b) in the case of an illegitimate boy or an illegitimate unmarried girl — the mother, and after her, the father;...

Section 13. Welfare of minor to be paramount consideration. —

1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

2) No person shall be entitled to guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of the opinion that his or her guardianship will not be for the welfare of the minor.

Guardians and Wards Act, 1890

Section 17. Matters to be considered by the court in appointing a guardian.

1) In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistent with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

2) In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

3) If the minor is old enough to form an intelligent preference, the court may consider that preference.

4) (Omitted).

5) The court shall not appoint or declare any person to be a guardian against his will.

Section 19. Guardian not to be appointed by the court in certain cases. —

Nothing in this chapter shall authorise the court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person —...

b) of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor.

However S. 19 GWA dilutes the welfare principle by stating that "Nothing in this chapter shall authorise the court...to appoint or declare a guardian...of a minor whose father is living and is not in the opinion of the court unfit to be the guardian of the person of the minor."

Law Commission Recommendations

Though the legislature has given statutory recognition to the welfare principle, it has been interpreted by the courts in many cases to be subject to the proviso that the father must be declared unfit to be guardian before anyone else can be the guardian.

Recognising this, the Law Commission of India in it's 135th report in 1989 observed at page 15: "Since some of the salient and important considerations (of the welfare principle) have not been spelt out, very often, particularly at the trial court, the welfare principle is not correctly interpreted and applied to the factual situation presented by the case coming up before the court." The commission pointed out that the confusion in the law had led to enough hardship and the only solution was to amend the law. The commission also felt that there was no special or economic justification for the discrimination against the mother on the question of natural guardianship.

The commission recommended:

1) The mother should have the same and equal rights vis-a-vis the father. Thus, S. 6(a) HMGA should be amended so that both the mother and the father are natural guardians 'jointly and severally' of the minor.

2) The custody of a minor who has not completed 12 years of age should ordinarily be with the mother, and the proviso to S. 6(a) HMGA should be amended accordingly.

4) Not only a "father", but also a "mother" has a claim to the exclusion of others to be appointed a guardian of a minor unless considered unfit by the court. Hence, S. 19(b) GWA must replace references to "father" by "father and mother".

Developments Abroad

The status of the mother under British Law was improved from time to time and in 1973, the Guardianship Act was enacted which gives the mother and father equal rights in relation to the custody and upbringing, as well as administration of any property belonging to the minor. In addition there is a shift away from the concept of "rights" of the mother and father towards a greater emphasis on the "welfare" of the minor.

Historically, Australian fathers, like their British counterparts, had absolute rights to the guardianship of their legitimate infant children, to the extent that on their death, they could will away guardianship of the child, irrespective of the mother's wishes. After the Equity Codes were set tip under the Family Maintenance and Guardianship of Infants Act, 1916 the courts began to elevate the status of motherhood which led to the development of the "tender years" doctrine. In 1976, Australian Family Law underwent a revolutionary change when the Family Law Act, 1975 was enacted which provided for joint guardianship and joint custody (*vide* S. 63F). In disputed cases of guardianship, custody or access, the Family Court was directed to regard the welfare of the minor as the paramount consideration (*vide* S. 60D).

Constitutional Validity

On 14 August 1991, a petition was filed by Dr Vandana Shiva (based on facts pertaining to her own case) challenging the law on natural guardianship.

The grounds of challenge are the following:

1) Articles 14 and 15 of the Constitution guarantee the right to equality, with Article 15 precluding discrimination on the basis of sex. Further, Article 15(3) mandates that beneficial provisions should be made in favour of women. It is obvious that S. 6(a) HMGA and 19(b) GWA do the very opposite.

2) From the birth of the child and during its childhood the mother is the primary caretaker, guardian and custodian as a result of natural division of labour between the sexes. The law itself recognises this fact in the proviso to S. 6(a) HMGA which gives the mother custody of the child till it is 5 years old. In addition, with the breakdown of the traditional nuclear family, many women are heads of households and primary breadwinners, sometimes as a result of desertion by the husband and father.

In this changed social context where the mother has the custody and the responsibility of taking care of the child, it is highly illogical that the right to take decisions is with the father who remains the natural guardian. It is a situation which inevitably leads to conflict. The separation between custody and guardianship, between responsibility and rights, is based on gender alone, and is obviously not in the interest of the minor child. The rationale behind this divorce no longer holds true given the fact that women are increasingly becoming economically independent. Therefore, the petition argues, the right to make decisions regarding the child, who in any case is taken care of by the mother, must be vested in the mother.

3) Since the provisions of the Hindu Minority and Guardianship Act, 1956 are in addition to the Guardians and Wards Act, 1890 the courts have interpreted the welfare principle contained in S. 13 HMGA and S. 17 GWA as subject to the restriction contained in S. 19 GWA. This had led to considerable confusion and the crucial question of custody and guardianship of a child remains in a nebulous state to the detriment of the child's interest.

4) For claiming guardianship, the mother has to invariably approach the court, at considerable cost and hardship, since the father becomes the natural guardian by operation of law. Thus, the discrimination created by the law is violative of Article 21.

The petition goes on to pray that the mother should be declared the natural guardian, since she is biologically, emotionally and now even economically better suited for the job.

Conclusion

As the law stands today, the mother is less than equal in the eyes of the law. The petition filed by Dr Vandana Shiva seeks to reverse this balance of power in favour of the mother when it comes to her rights vis-a-vis her children.

(From, *The Lawyers*, April 1992)

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Poonam Saxena

Natural Mother as the Custodian of Her Child

MAHINDER NARAIN, J. of the Delhi High Court has held in *Smt Madhu Bala v/s. Arun Khanna* [AIR 1987 (81) Delhi] that the custodial rights of a child vest with the natural mother, even where the father cannot be declared as "unfit" for looking after the child.

Case History

The case started when the father of the child (a son aged 3 years) filed a petition under S. 25 of the Guardians and Wards Act, 1890 (GWA) seeking the child's custody on the ground that the child was removed from his custody by the mother, without his consent. It was further pleaded by him that the mother was not competent to have the son with her, as she was immoral, adulterous and had remarried. These allegations however, were purely oral statements not based on documentary or other evidence. The guardian judge, chose to base his judgement on these allegations and ruled adversely against the mother. On appeal, the High Court not only disbelieved all these allegations as being vague and inconclusive, but also reversed the judgement to hold guardianship in favour of the mother.

The father admitted impliedly before the High Court, that he himself was not in a position to look after the child. Working as a field assistant in a security organisation of the Government of India, he was required to perform duties which necessitated him to move out often, from both his office and his home; consequently, he was totally dependent on his two unmarried sisters and parents, for the upbringing of the child. This conflict on the question of custody and the tug-of-war over the child, therefore, was not directly between the father and the mother, but between the relations of the father on one hand and the mother on the other hand.

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The court in the present case adopted a liberal interpretation of the language of S. 25 and disregarded (correctly so) the narrow approach adopted in a number of cases [see *Ratan Amol Singh v/s. Smt Kamaljeet Kaur* AIR 1961 Punj 51; *Kumarswami v/s. Rajammal* AIR 1957 Mad 563; in *Lovejoy Patel* AIR 1944 Cal 433; *Chandra Kumar v/s. Chhote Lal* AIR 1925 Oudh 282] on the question, as to whether the person to whom the court feels custody should be given in the welfare of the child, should also be appointed its guardian.

Conservative Tradition

It may be pointed out, that S. 25 of the GWA which was originally enacted as a corollary to S. 19 was meant to give effect to the traditional absolute rights of the father, or guardian to the custody of the child: guardianship and custody being inter-locked concepts, at the time of the framing of this Act. The supremacy of paternal rights had therefore subordinated the paramountcy of welfare of the children. The rights of the mother to the custody of the child, in the presence of the father (as the natural guardian), therefore, were negligible; so much so that the ward or the child, if removed from the custody of the father or the natural guardian, could be arrested and delivered back to him [Ss. 25 and 9 of the GWA].

The Hindu Minority and Guardianship Act, 1956 (HMGA) whose provisions are in addition to and do not substitute the GWA (S. 2) entitled the mother to the custody of the children below the age of five years only (S. 6). Even this provision, recognising the limited rights of the mother is not mandatory in application, but only directory. Putting forward of sufficient grounds by the father regarding the unfitness of the mother can thus deprive her even of this limited right. The law is therefore heavily against the mother.

The espousal of such orthodox and conservative views by the legislature authorising the father with complete control and rights over the children to the exclusion of their mother is anachronistic and reactionary. A woman who produces a child, undergoing the entire physical and mental trauma of child birth is considered by the legislature to be fit only for its nursing and incapable of looking after and shaping its future after the child attains the age of five years. This preponderous conclusion of the legislature, goes not only against the practical reality and rules of nature, but also against the welfare of the children — a concept which has been inculcated and incorporated in the Act (S. 13, HMGA) and has also been accorded judicial recognition [*Mohd. Yonus v/s. Shamshad Bano* AIR 1985 All 217; *Raj Rani v/s. Subhash Chander* AIR 1983 DLT 240; *Rosy Jacob v/s. Jacob* AIR 1973 SC 2090; *Latta v/s. Ganga* AIR 1973 Raj 93] as being of primary

consideration, while deciding the question of custody and guardianship of the children.

Progressive Interpretation

The court in the present case, while adopting a progressive attitude, disregarded the orthodox and parochial outlook of paternal power and supremacy of the father's right over his children. Pronouncing a judgement, which is in conformity with the basic objective of the Act, it observed:

"No person other than a natural mother is in my view whether she works for a living or does not, or merely is a housewife, is in any case a better person for bringing up the child, in case of a male child at least uptil such time as he attains puberty. Both the maternal love and maternal discipline are required for bringing up the child."

The court was not in favour of depriving the father of the guardianship, but at the same time, while granting to the mother, the custody of the son, aged seven years (at the time of the pronouncement of the judgement the son was seven years old) it has given judicial recognition of the importance of the mother's contribution in the bringing up of the child and for its welfare. It also dismissed the contention of the father, that the mother being a working woman would not be able to give sufficient attention to the child and observed that "when the working mother has the custody of a school going boy, he would have her company after she finishes her work...continuity of the care with the mother should not be disturbed."

The judiciary in the present case, therefore, while liberalising the rule of incapacity of the mother to the custody of the child has made a valiant effort to uplift her status through the instrumentality of law.

It may also be pointed out here that the paramountcy of the welfare of children in matters of their custody in the event of separation between their parents, was inculcated and given judicial recognition in England in 1925, and was again firmly established by the Guardians of Minors Act, 1971-73. One is constrained to view the Indian legislature's indifference to modify our ancient piece of legislation namely, the GWA along these lines. The court, therefore, should be complimented for its efforts to achieve what the legislature has consistently and unfortunately failed to do.

(From, *The Lawyers*, October 1989)

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Anuradha Bindra

Child Custody for Hindus Only

SMT INDUMATI PAL KORRICHH filed a Writ Petition [No.325 (Misc) of 1993] seeking the issuance of the Writ Certiorari and Mandamus by the High Court of Allahabad (Lucknow Bench), for quashing the order of the Family Court which had granted her husband, Yogendra Pal Korrichh, custody of their children. She pleaded for custody, on the grounds that even though the Petitioner had converted from Christianity to Hinduism before her marriage and was married under the Hindu Marriage Act, she was still a Christian. Hence, the provisions of the Guardians and Wards Act applied, instead of those of the Hindu Guardianship and Maintenance Act. In counter argument, the husband insisted that if the children were permitted to stay with their mother, they would be educated in missionary schools and, thus, would be brainwashed against their culture.

Even more surprising than both parties' pleas, was the judge's response to them. Justice H.N. Tiwari engaged in a long and futile exercise of defining "Hindu" and determining whether the Petitioner fit into this categorisation, when all that was required was for the court to determine the applicability of the Hindu Guardianship and Maintenance Act. Thereafter, the court commented in detail on the education in missionary institutions, making that the basis of the custody decision.

Facts

The history of the couple is simple: when they met, the Petitioner was a Christian and the Opposite Party No.2, Yogendra Pal, was a Hindu. Despite their religious differences, after a passionate courtship, the two decided to get married. The Petitioner converted to Hinduism and changed her name from Irene Mary to Indumati. On 5.2.76, the couple was married in accordance with Hindu rites, under the requirements of the Arya Samaj. In wedlock, they had two children, born on 12.4.77 and 14.8.78.

Thereafter, unfortunately, "even with the love of the two, and perhaps it was not love but temporary satisfaction or lust that attracted the two towards each other...their relations became strained, the two could not pull on to either the vagrancy of what is called a love marriage or the marriage association." The Petitioner claimed that she had to leave her matrimonial home with her two children because of her husband's harsh treatment. On 29.5.84, she filed a petition for dissolution of marriage on the grounds of cruelty and adultery under S. 13 of the Hindu Marriage Act; on 13.1.85, the opposite party No. 2 responded with an application for custody under S. 26 of the same act.

Although the Petitioner had filed her dissolution of marriage petition under the HMA, she argued that the Hindu Minority and Guardianship Act was not applicable to her custody case; although she had converted to Hinduism, she claimed that she still had to be judged as a Christian. Next, she argued that the religion of the parents should not be a factor in deciding what is in the best interest of the children; the doctrine of spiritual need of the children, particularly when the parents are of different religions, should be irrelevant. The Petitioner further pleaded that, under S. 17 of the Guardian and Wards Act, the wishes of the minor children aged 15 and 16 respectively should be given due consideration and weight. Finally, she noted that she was contributing to the children's education in La Martiniere college, one of the premier institutions, while the husband offered no gifts to his children and seldom paid them visits.

In contrast, the Opposite Party No. 2 alleged that both the children and their mother are Hindu, so the Hindu Minority and Guardianship should apply. Furthermore, he explained that it was not in the best interest of the children to study in a Christian missionary school: "In the context of building up of the ethical and national character of the children are concerned, that missionary schools brain wash the younger ones and to paint them with Christianity and reverence to foreign elements on one hand and render them to think of their own national heritage in a little manner."

While the case was pending, the learned judge of the Family Court granted custody to the husband. In his written opinion, he focused on three questions: (1) "What is a Hindu?"; (2) "Is the Petitioner a Hindu, so that the Hindu Minority Guardianship Act applies?"; and (3) "What factors should be considered in order to act in the best interest of a minor's welfare?"

A Hindu is...

In labouring over the definition of "Hindu", the judge referenced Mulla's *Principles of Hindu Law*, the *Encyclopedia Britannica, Constitu-*

tional Debates, Article 25 Expl.II, S. 2(3) of the Hindu Guardianship Act, and S. 2 of the Hindu Marriage Act. Finally, he concluded that the "expression 'Hindu', as such, includes everyone who is born in India and whose motherland is Hindustan or who has eternally and earnestly adopted Hindustan or India as his mother, the motherland, whatever be his mode of worship, whatever be his way of living...and who has the sense of respect and honour for the great men, women, and children of this land, Hindustan."

In applying its newly derived definition to the case at hand, the court held that the Petitioner, because she had converted to Hinduism and because no proof existed of any conversion back to Christianity, was a Hindu for purposes of the Hindu Minority and Guardianship Act. Thus, the court applied the provision in S. 6 which states that the father is the natural guardian of an unmarried daughter and minor son. In response to the Petitioner's contention that the Opposite Party No. 2 rarely visited the minors and never gave them gifts, the court reasoned that the "blame of it is to go to none else but the Petitioner and the members of the family of her mother's side, since it was they who did not allow the Opposite Party No. 2 to contact the children."

The rest of the opinion largely centres on the welfare of the children and how it is affected by the teaching in Christian missionary schools. The learned judge opined that, in accordance with S. 17(1) of the Guardian and Wards Act and S. 13 of the Hindu Minority and Guardianship Act, the minor's welfare should be the paramount consideration in a custody dispute. Sufficient weight must be placed on the development of the child's ethical, personal, and national values and, most significantly, this includes his moral and/or spiritual welfare; hence, religion must be taken into account.

The court also referred to S. 17(2) of the Guardian and Wards Act and S. 26 of Hindu Marriage Act (since the application in the Family Court was filed under this provision) for the criteria necessary in the appointment of a guardian, which were to be read alongside the law of minors. Under these provisions, the age, sex, character, religion, and capacity of the proposed guardian should be considered. If the minor is old enough to give an intelligent preference, the court should acknowledge it.

Lastly, the court stressed the role of education: it "is an important factor in the upbringing and building up of the mental caliber and affecting the mode of thinking as well as the conduct and behaviour of the young ones."

Missionary Schools be Damned!

Given these pronouncements, the court went on to analyse the impact of Christian missionary schools on the upbringing of Indian children.

Referring to Pandit Jawaharlal Nehru's *Glimpses of World History*, the judge noted that though Christianity does not preach violence, its followers contributed to the division of India.

Consequently, in this case, the judge held that granting custody to the mother would not be in the best interests of the children: "It cannot be disputed that in the present circumstances the custody to the mother is against the spiritual welfare of the minor children because they are not being brought up in the religion of their father and they are practically being turned into Christians." (This was also the main factor considered by the Family Court when granting custody to the father.)

In addition, the court removed all blame from the Opposite Party No. 2 and placed it on the Petitioner.

The court held that the Opposite Party No. 2 cannot be said to have perverse thinking, and that it is natural for him to object to sending his children to a Christian missionary institution. Children who attend such schools, "may feel and think that they do not belong to India, that their nationality is not Hindustani, and that their source of inspiration is not Hindustan, but in some foreign land...If that is so then...it can be said that for...the moral and spiritual welfare of the minor...it would definitely be just and proper that the minors be put in custody of the father and not of the mother."

The court held that they would not alter the judgement of the Family Court, except that visitation rights would be granted to the mother. The Petitioner would be allowed to visit the children once a week at the house of the Opposite Party No. 2.

This case illustrates the judge's total lack of understanding of the law relating to child custody. Completely irrelevant considerations were taken into account and wholly unjustified remarks were made. While the judge acknowledged the provision of S. 17 of the Guardian and Wards Act which allows a court to consider a minor's opinion if he is old enough to give an intelligent preference, neither he nor the Family Court judge did so in this case where the children were 15 and 16 years old. And the most important factor, the welfare of the children, which should have guided the court, was clouded with inappropriate political statements disguised as patriotism.

(From, *The Lawyers*, February 1994)

Part Five

Matrimonial Property

39

Marjorie Berman

Married Women's Property Rights

LAWS GOVERNING MATRIMONIAL PROPERTY both during and upon dissolution of the marriage are established by state law in the United States. Any discussion therefore of marital property law must be general enough to account for the variation between jurisdictions. Matrimonial property laws fall generally into two distinct categories — those of common law states and those of community property states. This discussion addresses how property is managed and distributed both during marriage and upon dissolution of the marriage under each of these models.

Common Law States

The overwhelming majority of states, 42 out of 50 follow the common law model. A distinguishing feature of matrimonial property law in common law states is that the laws apply only at the breakdown of marriage, either upon divorce or death. These laws do not operate during the lifetime of the marriage. During the marriage, property is maintained and controlled by the person who has purchased it and claimed title to it (generally the man). To a great extent the common law's emphasis on title as the indicator of ownership and control stems from the historical arrangement whereby women lost all legal rights to property once they were married. Indeed, until the mid nineteenth century reforms of the Married Women's Property Acts, everything belonged to the husband.

Today married women retain the right to the management and ownership of their separate property acquired prior to the marriage. A married woman can dispose of her own property in any way she wishes; she can sell property she holds in her own name, she can convey it in a will; she can use it to pay off debts. She requires neither her husband's permission nor signature, nor may her husband take her property or money without her permission (*Draft Manual on Marriage and Divorce*, Women's Rights

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Litigation Clinic, Rutgers School of Law, 1987). By the same token, however, her husband retains all rights to his separate property.

Management and control of marital property remains in the hands of the party who retains title. Generally, it is the man, with access to economic resources, who retains title and therefore owns and exclusively controls the bulk of the property during the marriage. The wife therefore may have no voice in how the family's money is used or invested although such decisions are certain to affect her present support and security in the event of divorce or death.

Equitable Distribution

Upon divorce, property distribution in most states is governed by "equitable distribution" laws. Equitable distribution theory, advanced in the early 1970s proceeds on the principle that property accumulated during a marriage should be equitably divided between the parties based upon how much each gave to the marriage plus an array of other factors. It allows for distribution of property to a party even though the party does not have title to that property. The factors influencing distribution include the length of the marriage, the age and health of the parties, earning capacities, vocational skills, the need of a custodial parent to occupy or own the marital residence, the income producing capacity of the property, and tax consequences of property division. The list of factors minimises the historical emphasis on marital "fault" such as adultery or desertion as a factor influencing the division of property.

Most notably, equitable distribution theoretically accounts for the previously non-quantifiable contribution of homemaker services. It recognises that but for the contribution of these services the economic assets of the marriage could not have been realised to their full extent. Previously a homemaker spouse was unable to claim ownership or contribution to marital property bought with her husband's money. State laws still vary, however, with regard to their emphasis on the value of homemaker contribution. More progressive states argue that the homemaker's contribution and the monetary contribution are equal if each is performed satisfactorily. Other states continue to place only a minimal value on homemaker services. Equitable distribution applies only to "marital" property as opposed to "separate" property. Separate property is commonly defined as property brought into the marriage or acquired during the marriage by gift or inheritance. Separate property belongs to only one party and the other party has no claim or interest in it. Marital property, on the other hand generally includes that property acquired through the joint efforts of the spouses. It includes property acquired during the marriage, regardless of form or title.

There is great variation among the states regarding which items fall into which category. In some states the line dividing separate and marital property is very rigid whereas other states permit equity principles, where necessary, to intervene in the distribution of separate property. The controversy becomes particularly acute with regard to categorising newer forms of property such as right to future earnings, goodwill of a business, worth of a professional degree, contribution to spouse's education, personal injury claims and pension interests.

State legislatures define the statutory guidelines or factors for property distribution, but judges retain wide discretion in their application. Generally the woman, traditionally the less propertied spouse, bears the burden of proof regarding her contribution to the marital property which is in her husband's name as well as the monetary value of that contribution. Furthermore, despite the impressive range of standards to fashion an equitable distribution, often insufficient attention is given to the marketplace realities which negatively impact a woman's ability to acquire future earnings. For example, while in theory a woman's education may make her eligible for a particular job, her age and displacement from the job market for many years may preclude her from acquiring employment.

Equitable distribution has been described most magnanimously as a system of "individualised justice where the judge is placed in the position of quantifying and assessing each spouse's contribution to the marriage and its assets" and making a determination that is fair and practicable in terms of the interests of all members of the family [Brake, *Equitable Distribution v/s. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 BCC 761, 776 (1982)]. More critical students have viewed it more like a "lottery system whose outcome greatly depends on the luck of the judicial draw and the competence of counsel". [Glendon, *Family Law Reform in the 80s*, 44 LaL Review 1556, 1571 (1984)]

Fixed Share Statutes

Upon death of a spouse, in common law jurisdictions "fixed-share" statutes govern the distribution of property. Under these statutes the surviving wife will always receive some share of her husband's estate although the share will not necessarily reflect either the spouse's need or any contribution to the marital property. If the husband dies without leaving a will, the surviving wife is allocated not less than one-third of his net estate although the precise figure varies among jurisdictions. If the husband leaves a will at death, the surviving wife may elect to take the share left to her by the will or to receive a statutory share which is determined by the law of each jurisdiction.

A major difficulty which women face under the fixed-share statutes scheme is that a husband who wishes to deprive his wife of receiving his property upon death may anticipatively transfer his property to a third party. This is done while he is still living. This transfer drastically reduces the value of his net estate and accordingly the share which his wife will be eligible to inherit. The law has started to recognise the frequency of this practice and fourteen states have adopted the Uniform Probate Code of 1969 which advances the concept of the augmented estate.

The official comment to the Code describes the provisions as preventing arrangements by the owner of the wealth which would transmit property to anyone other than a surviving spouse, by means other than probate, for the deliberate purpose of defeating the rights of the surviving spouse. Despite these reforms, however, loopholes still make it possible for the propertied spouse to circumvent efforts for a just distribution. Note as well, that should the non-propertied spouse (generally the wife) die first, she has no rights to dispose of assets which would become hers upon her husband's death, but over which she has no present title under common law jurisdiction. Common law statutes, as discussed above, apply only upon dissolution of the marriage and not in anticipation of such.

Community Property States

Eight states have the civil law concept of community property. In community property states, the spouses' property is classified as either separate or community and remains classified as such throughout the duration and upon dissolution of the marriage. Only community property is subject to division. Community property statutes contain a presumption that all property acquired during the marriage is community property. The difficulties met in the common law system of categorising non-traditional forms of property are substantially the same in these states.

A significant advantage for women under the community property system is that the law operates during the marriage as well as at its dissolution. The starting point is that each spouse owns a present, vested, undivided one-half interest in all community property from the time of acquisition. Each therefore has an equal claim to community property and neither is subject to sustaining burdens of proof regarding contribution to the property.

The present undivided interest concept, however, is somewhat illusory. While each spouse retains management and control rights over his/her separate property, the degree of control over community property varies among the states. The majority of states, however, do require cooperation of the spouses for the disposal of real community property, the sale of

household goods and the acquisition of real community property. In the areas where each spouse is entitled to management and control of both his/her one-half interest as well as the other spouse's interest, spouses are held to a good faith standard.

Upon divorce, the majority of community property states divide property "equitably" although some states require that the property be divided "equally". Equitable distribution operates here in a fashion similar to equitable distribution in common law jurisdictions except that each spouse enters the proceeding with the presumption of a one-half interest. Therefore there is no burden as in common law states of proving contribution.

Equal division is literally the division of the property into two equal shares. Equal distribution however, often turns to be quite unequal particularly for the spouse (generally the woman) who retains custody of the children and must pay those expenses out of her "equal" share. It also turns out unfairly in circumstances where there is little physical property to divide at the time of the divorce but one spouse and not the other retains a high future earning potential (for example if the spouse has just completed his education). Finally, equal distribution fails to account for pre-existing economic inequalities between men and women.

Equitable statutes provide guidelines for distribution that are quite similar to the equitable distribution standards in common law states. Factors that are generally considered include the origins of the property, fault on the part of one or both parties, (where applicable), future earning capabilities, contribution of one spouse to the increased value of property owned by the other spouse, the needs of the children of the marriage and age and physical conditions of the parties at the time of the divorce.

The community property relationship terminates at death of either spouse. The surviving spouse retains his/her separate property plus one-half of the community property. Each spouse may dispose of his/her share to whoever he/she chooses. This differs from the rule in common law states where only the party who has title can make a testamentary disposition.

Property Distribution v/s. Alimony

Prior to the advent of equitable distribution laws, alimony was the best women could hope for upon divorce. Support through alimony was clearly favourable to the practice of splitting property based on title, which effectively assured the woman nothing. Today, property settlement is an alternative to alimony although sometimes the court ordered distribution may include the payment of alimony for some time. There are two major differences between the two methods.

The first is that property settlement is a one time affair which cannot be subsequently altered. Alimony, however, at any time may be increased, decreased or terminated by a court because of changed circumstances since the time of the decree. Such changed circumstances may include the wife's death or remarriage, the husband's death or changed financial situation, or a judicial determination that the party receiving alimony no longer has sufficient "need" for it. Alimony payments may also be difficult, time consuming and costly to collect if the husband is uncooperative. On the other hand, if money payments are part of the property settlement, a woman may find it increasingly difficult to sustain herself on an amount which continues to deflate in value over the years.

Another major difference turns on who pays taxes. Alimony payments are tax-deductible while alimony receipt is taxable. The actual value of the alimony therefore, can be significantly different from how it appears on paper. When payment is part of the property settlement, the propertied spouse is required to pay taxes.

The Uniform Marital Property Act

The Uniform Marital Property Act (UMPA) is the most recent of a series of legal reforms which began in the late 1960s to respond to changing attitudes, expectations, economics and demographics of the marriage institution. Approved by the National Conference of Commissioners on Uniform State Laws in 1983, the legislation attempts to rectify the major inadequacies of the common law on marital property. Although common law states have moved closer to the concept of shared property through principles such as equitable distribution, the UMPA represents a concrete shift to the principle that ownership of all economic rewards from the personal contributions of each spouse is shared by the spouses in vested present and equal interests. Ownership rights are in place at the time of the marriage and remain there upon death or divorce. Therefore, they do not have to come to fruition as a result of court ordained and possible adversary division or by a statutorily sanctioned transfer. The UMPA translates the emotional and perceived concept of "ours" into a verified legal reality. In this sense, the UMPA is closely modelled on but improves upon the community property system.

The UMPA reflects several major concepts. The first, as described above, is the concept of present vested ownership rights in each spouse. Property brought into the marriage or acquired after marriage by gift or inheritance remains individual property. The appreciation of individual property remains individual, unless the appreciation is the result of a strong and significant contribution of the spouse. Partly to maintain simplicity in

the Act, income from individual property, which is presumed to be present during the marriage anyway, is treated as marital property. In addition, the provision treats similarly, couples whose main source of income is wages and those whose main source of income derives from gifts or inherited wealth of one spouse. The Act contains a presumption in favour of marital property.

Next, management and control of property remains in the hands of the party who retains title. In this sense it is closely modelled on the common law system. The major distinction and improvement however is that title under the UMPA does not signify ownership. If spouses hold property jointly they both must participate in its management and control unless they have agreed to an alternative arrangement. Where one party is managing property for the couple, that party is held to a good faith duty to protect the property interests of the other. Remedies are available for violation of the good faith duty.

Third, the UMPA provides couples with freedom to contract and the right to opt in or out of nearly any provision of the Act by private arrangement. Such agreements must be in writing and signed by both spouses and can be made and amended at any point and as often as necessary during the marriage. The few limitations of private contracting exist to prevent unconscionable agreements or contracts which are contrary to public policy or adversely affect the children of the marriage.

Fourth, the Act primarily confirms ownership of property as divorce proceedings begin. It leaves to existing dissolution procedures in the several states the selection of appropriate procedures for dividing property.

Finally, after marriage, creditor claims to property predating the marriage can only be satisfied by the property which would have been accessible prior to the marriage. Obligations incurred during the marriage are presumed to be incurred in the interest of the marriage and those obligations may be satisfied from marital property or the contracting spouse's individual property.

Conclusion

The UMPA represents an improvement to both community property and common law because among other things it ensures consistency in application and predictability. Nevertheless, only one state has thus far adopted it. Nationwide acceptance of the UMPA would go a long way towards establishing uniformity across jurisdictions and towards promoting economic equality both in marriage and upon its dissolution.

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Freddy Farm

Women's Right to Matrimonial Home

FOR MARRIED WOMEN, the security of the marital home may turn out to be merely an illusion if their husbands turn them out of the house or harass them so much that they can no longer stay at home. Generally, married women are economically dependent on their husbands, and the marital home is the husband's property. The wife will normally not have a legally recognised proprietary interest in her own home. This means that if she is forced to leave, her husband can try to justify her eviction by asserting that he has the right to do what he wants with his property. But for women in such circumstances, the problem of losing their marital home is acute. Their lives are severely disrupted, and they suddenly face the burden of establishing a new home for themselves and their children. Married women cannot always rely on their own family to take them in, nor are they likely to have independent resources to obtain immediate, safe, and suitable alternative housing. Their difficulty is exacerbated by the shortage of decent housing, especially in urban areas like Bombay; by the trauma of moving to a strange neighbourhood; and by society's disapproval of women who live alone.

Basis of Right

Given the apparent hardship women face, if they are dispossessed, several arguments can be made that support a wife's legal right to stay in the home. First, because the reality of most married women's lives is that they are economically dependent upon their husbands. Under common law, wives have a right to receive maintenance from their husbands, which includes a place to live. Thus in the case of disagreement or separation between the spouses, the husband still owes his wife a residence and she should have the right to stay in her home. From this perspective, the

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husband acquires an obligation to insure his wife's welfare which inhibits him from freely doing what he would like with his property. Because housing can be hard to locate, it is not enough for the husband to promise to give his wife increased maintenance with which to pay for housing; she must be provided an actual place to stay. Further, if the wife has contributed her unpaid labour to the household, such as through child care, cooking, or other services, it is possible to argue that through her labour she has acquired an equitable interest in the husband's property. Consequently, even if the home is in the husband's name he should still not have the power to evict his wife.

In addition to her right to support from her husband, a wife who has been living in the matrimonial home is in the position of any peaceful occupant of property who develops certain possessory rights. The law recognises that people in actual possession of property deserve protection from unexpected disturbance, and prohibits them from being forcibly dispossessed without a court order. Occupants are protected even if they do not have a title to the property. In India, this protection is currently contained in the Specific Relief Act. By analogy, husbands should not be allowed to forcibly evict their wives, especially if the eviction is intended to harass the wife or alter the *status quo* to her disadvantage. Because the property in question is a residence, the need to protect the occupying wife is even more important. The wife's possession should give her a claim to the actual home itself, and not just against the husband as her legal supporter.

English Law

The law's response to the plight of wives threatened with eviction has changed radically in the past century, from unswerving deference to the husband's property rights to the current sympathetic view. Under old English common law, women had no legal right to reside in their matrimonial home if their husbands wanted to evict them. A wife's obligation was to live with her husband, in exchange for which he was expected to provide her with the necessaries of survival; but if he neglected or abandoned her she had virtually no recourse. If a husband threw his wife out of the home, she had no right to return and could not force him to pay for her to live elsewhere. As put by Lord Denning, a wife "was treated by the law more like a piece of furniture than anything else. The husband could not sue her in ejectment or trespass, but neither could he sue a piece of furniture. He could bundle his furniture out into the street and so he could his wife."

Contemporary common law doctrine has rejected this principle, and now recognises the right of a deserted wife to stay in the matrimonial home. By the beginning of the twentieth century, women were recognised as

having a separate legal identity from their husbands and were granted the right to sue their husbands for maintenance. As an extension of her right to maintenance, courts accepted the proposition that if a husband deserted his wife, under common law, he did not have the power to throw her out of the home without a court order.

Again in the words of Lord Denning, the view of common law is that "it is the husband's duty to provide his wife with a roof over her head; and the children too. So long as the wife behaves herself, she is entitled to remain in the matrimonial home. The husband is not at liberty to turn her out of it, neither by virtue of his command, nor by force of his conduct. If he should seek to get rid of her, the court will restrain him. If he should succeed in making her go, the court will restore her. In an extreme case, if his conduct is so outrageous as to make it impossible for them to live together, the court will order him to go out and leave her there." [*Gurasz v/s. Gurasz* 1969 (3) All ER 822, 823].

In a succession of cases, English Courts have agreed that a wife has the right to stay in the matrimonial home regardless of whether title is in her name or that of her husband. In *Shipman v/s. Shipman* [1924 All ER 365] the court granted a woman the right to stay in the home when it was in her name. In *Silverstone v/s. Silverstone* [1953 (1) All ER 556], a wife was granted the right to stay in the matrimonial home during the pendency of a divorce petition when the home was owned by the husband [See also *Jones v/s. Jones* 1971 (1) All ER 737, in which the tenancy of the matrimonial home was in the husband's name]. In *Gurasz v/s. Gurasz*, the court again permitted a wife to occupy the marital home regardless of the fact that it was jointly owned by the spouses. If the husband attempts to sell the matrimonial home while his wife and children are still living there, he may be enjoined from doing so until he provides suitable alternative accommodation for them [*Lee v/s. Lee*, 1952 (1) All ER 1299]. Her right to stay in the home survives even after the parties have separated.

Third Party Owner

Initially, English Courts permitted a wife to remain in occupation of the matrimonial home both when her husband attempted to evict her and when third parties who had obtained title of the home attempted to take sole possession. In the more influential of these cases, *Bendall v/s. McWhirter* [1952 (1) All ER 1307], a deserted wife continued to stay in the matrimonial home, which was mortgaged. When the husband went bankrupt the home passed to the trustee in bankruptcy, who brought an action for possession. In a decision by Lord Denning the court held that the wife's right was in the nature of an irrevocable license that was binding both

against her husband and against the trustee. This decision favoured the welfare and security of married women over the property interests of whoever owned the marital home, whether the husband or one to whom the home was conveyed.

However, the House of Lords in *National Provincial Bank Ltd. v/s. Ainsworth* [1965 (2) All ER 472] ruled that a wife does not have the right to maintain possession of the matrimonial home if a third party mortgagor has legitimately obtained title. Here a deserted wife remained in the matrimonial home, which was mortgaged to a bank. The husband defaulted on his payments and the bank sought possession. The House of Lords held that the wife's right to maintenance only applied to her husband, and that while she had a right to be provided with a home she had no possessory right to any particular residence. Her right is purely "personal" and does not attach to the actual home itself. The Lords agreed that the husband could not evict his wife from the marital home, but ordered that the trustee should be given possession. In an important reservation, the Lords cautioned that a husband cannot make fraudulent or sham transfers to third parties in order to defeat the wife's right to maintenance and possession of the matrimonial home. For example, when a wife remains in the matrimonial home and her husband transfers title to his brother-in-law who in fact never paid for the property, the brother-in-law's action for possession will not be successful [*Ferris, v/s. Weaver*, 1952 (2) All ER 233].

Matrimonial Home Act

The *Ainsworth* decision clearly favoured the interests of vested property owners in making unencumbered transfers of title over concerns for women's welfare or possessory interests. Effectively, it meant that under common law women lost their right to stay in the matrimonial home once the husband transferred it to a third party. In order to restore protection to wives in such situations, the Matrimonial Home Act, 1967 was passed. This Act gives spouses who do not have a legal interest in the home a right to occupy it, meaning that a spouse who occupies the matrimonial home cannot be evicted from it, and one who is not in possession has right to re-enter it.

A wife's common law right to stay in the matrimonial home normally does not give her a right to exclusive possession. However, if the husband acts in such a way that the wife cannot live with him in the same house, she may be granted an injunction ordering the husband out of the matrimonial home. For instance in *Jones v/s. Jones*, where the husband had installed his mistress in the home and thereby forced his wife to leave, the court granted an injunction restoring possession to her and ousting the husband. In

Silverstone v/s. Silverstone, the court restrained the husband from entering the matrimonial home during the pendency of a divorce petition filed by the wife, because it felt that if he were permitted to return, the husband would evict the wife in an attempt to make her abandon the petition.

Position in India

Indian women do not have an express statutory right under Personal Law to stay in the matrimonial home. Despite the lack of a guarantee, almost all Indian Courts which have considered the issue, have concluded that a wife has the right to occupy the matrimonial home and even to exclude her husband in certain situations. The courts have not always explained the basis for this view, but most often it has been justified by the husband's maintenance obligation. Indian Personal Laws guarantee women maintenance by their husbands during their marriage, including housing, and make the assumption that wives and husbands should have conjugal relations.

In *Banoo Jal Daruwalla v/s. Jal C. Daruwalla* [1962 Bom LR 750], the husband and wife had obtained a judicial separation, but both spouses claimed the sole right to stay in the marital home. The home was owned by the husband. The court took notice of the decision in the English case *Bendall v/s. McWhirter* and stated that "whenever it is practicable" the wife should not be thrown out of the marital home. However, it also held that the husband should not be thrown out unless he "is guilty of extreme cruelty and otherwise undeserving". Since the court felt that the spouses could not continue to live in the same house, it ignored its own rule that the wife should not be evicted and ordered that the husband should have sole occupancy. It did not require the husband to show the availability of alternative housing for the wife, but it did require him to provide her with a larger maintenance so as to pay for housing.

The Bombay High Court took a more sympathetic view in *Shanta Wadhwa v/s. Purshottam Mohandas Wadhwa* [1977 Mah LJ 661]. Here the wife asked for a judicial separation on the ground of the husband's physical and emotional cruelty, and sought the right to stay in the home. The court observed that the wife's right to maintenance by the husband under the Hindu Adoption and Maintenance Act included residence, and ruled that the matrimonial home itself was maintenance to which she was due. It stated that the wife's right to stay in the home existed whether the husband, or the wife, or both spouses owned the property.

In a later case, *Abdul Rahim v/s. Padma* [AIR 1982 Bom 341], the Bombay High Court refused to grant an injunction excluding a wife from the matrimonial home after she had made allegations against her husband.

The wife had been excluded from the home after divorce proceedings had been initiated, but since had moved back in. Title to the property was in dispute. The court accepted that the wife had a right to stay in the home, noting that the husband had not provided alternative accommodation. However, the court also observed that she had no right to live in all or any particular section of the flat. It ordered the flat to be partitioned and the husband and wife to live in separate areas.

Legal Title Important

However, in *Pakhraj Jain v/s. Naina Jain* [appeal from Order No. 1003 of 1986, Dec. 1986, Bombay] the court refused to protect a woman from eviction from her matrimonial home. In this case the wife had been thrown out of the home by her husband. She later forced her way back in. The Lower Court granted the wife an injunction restraining the husband from evicting her again, but the High Court viewed the matter differently and vacated the injunction. According to J. Daud, the woman's re-entry against the husband's will was illegal trespass since the property was in the husband's name. If the wife were allowed to intrude where she had no legal title, the court felt the door would be opened to others to make claims to occupy private property. "A state subject to the rule of law, and India certainly is one, cannot permit this to happen — nay, not even in the name of feminism or for protection of the deserving." The court was apparently swayed both by the fact that under Hindu Law, the husband's property is separate from that of the wife, as well as by the fact that the wife had forced her way back into the home without resort to a court proceeding.

J. Daud's decision, with its emphasis on private property, contrasts sharply with the Andhra Pradesh High Court ruling in the matter of *B.H.P. & V. Ltd. v/s. Visakhapatnam* [AIR 1986 AP 207]. In this case a deserted wife occupied the matrimonial home, which was a flat rented from the husband's government employer. The husband retaliated against his wife by terminating the lease with his employer, and the wife requested an injunction restraining the employer from evicting her. The Lower Court granted the injunction and ordered the husband to continue to pay the rent. The employer filed a revision petition, claiming that the decision constituted a "failure of justice" under the C.P.C. and that the court did not have jurisdiction to do so.

The High Court upheld the Lower Court's order and rejected the petition. It noted that both the husband and the employer-landlord had for years recognised the wife's occupation of the quarters as her matrimonial home; since the landlord was a company, and not a natural person, it suffered no harm since it continued to receive rent from the husband. But

it stated that its fundamental reason for not revising the Lower Court's order rested on a "socialist" view of property rights, in which the parties' ownership rights had to be subordinated to the fundamental constitutional rights of the wife. Consequently the court held that it was proper for the Lower Court to refuse to aid the husband in his retaliatory eviction.

Special Circumstances

Courts have also issued orders permitting wives to stay in the matrimonial home and restraining their husbands from entering under special circumstances. In *B. v/s. B* [No. 215 of 1985, April 15, Civ Ct, Bombay], the court granted an injunction preventing a husband from entering the matrimonial home in conjunction with the wife's petition for divorce on the grounds of cruelty. The court observed that temporary or interim injunctions could be granted in order to maintain the *status quo* or protect the safety or interests of one of the parties. In *Shanta Wadhwa*, mentioned above, the court enjoined the husband from entering the matrimonial home under S. 18 of the Hindu Adoption and Maintenance Act because the husband had physically attacked his wife. But in *Bharti Shah v/s. Surendra Shah* [1983 (85) Bom LR 129) the court refused to grant an injunction excluding the husband from the home only because the husband had made allegations against the wife. However, the court agreed that "in exceptional cases on the ground of extraordinary immoral, vexatious conduct the interim relief of the kind may be extended to a *bona fide* and helpless spouse so as to protect the purity of the home and maintain peace till matters are settled by the court, applicative rule being wife remaining under the roof of the husband."

Since there are so few Indian cases considering women's rights to stay in the matrimonial home, it is difficult to tell how courts here will view such claims in the future. Still, this is a developing area of law that will undoubtedly be relied upon as women learn to assert their rights.

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Indira Jaising

The Communal Nature of Personal Laws — Do We Need a Marital Property Law?

THE GOVERNMENT OF MAHARASHTRA'S proposal to introduce joint property rights for women on marriage provides an appropriate occasion to evaluate the existing status of women in relation to their marital property rights. The proposal is limited to amending the Hindu Law and others only in consultation with members of their community. What this means is a forgone conclusion — the leaders of communities represented by their religious hierarchies will object and consequently, the proposal for them will be dropped.

But leaving that aside for the moment, let us examine the evolution of the status of Hindu women in Hindu Law, to examine the claim of its protagonists, that it is progressive, that it is reformed, that it is modern. The conclusions that we make are that it is neither progressive, nor reformed nor modern. The modification of the Hindu Law in the 1950s made the position of Hindu women worse than it was — which is the justification for introducing the concept of joint property on marriage.

Hindu Law — A Legacy of the British

It is generally believed that what we see as Hindu Law today is contained in the *Smriti* of Yagnavalkya (350 A.D.) with the commentaries by Vidyaneshwar — known as the Mitakshara (1150 A.D.). The Mitakshara is followed as the law of the land, except in Bengal where the Dayabhaga school is followed. There are regional variations of the Mitakshara. Other systems of law are also followed in some regions but the Mitakshara remains the dominant School of Law. After 1774, it is no longer possible to talk of Hindu Law, as what emerged thereafter can best be described as Anglo-Hindu Law. The Regulating Acts of 1772 set up the Supreme Court

of Judicature at Fort William till it was superseded by the High Court in 1861. Courts were empowered to decide matters of inheritance and disputes between parties if they were "Gentus" (i.e. Hindus), by the law of the Gentus; between Muslims, by Muslim Law and if only one of them was a Muslim or Gentu, by the law of the defendant. This remains the pattern of what has come to be known as Personal Law. A rule of inter-person conflict of laws worked out by an alien ruler remains to govern us in matters relating to marriage, divorce, inheritance etc. till date! Precedent is a source of law and in the final analysis, it is the interpretation of the commentaries by the British Courts, including the Privy Council, that can be said to be the repository of Hindu Law today.

Much of Hindu and Muslim Personal Law came to be enforced by courts by virtue of legalistic provisions such as S. 5, Punjab Laws Act, 1872, S. 5, Central Provinces Law Act, 1875, S. 3, Oudh Laws Act, 1876, S. 2, Muslim Personal Law (Shariat) Act, 1937. Since Article 372 of the Constitution provides that all laws in force in the territory of India shall continue to remain in force, these laws, including the decisions of the courts, continue to be the law of the land till today. That none of them have been successfully challenged on the ground that they discriminate against women, is a measure of the low priority women get on the political agenda. That none of them have been challenged on the ground that they discriminate between people of different religions on the ground of religion alone is a measure of the political strength of religious fundamentalists of both the Hindu and Muslim communities. Anti-women and pro-religious fundamentalists have much in common and are held together by a legal bond that makes women the victims of gender and religion at the same time.

The Definition of "Hindu"

It is time to return to the story of the Hindu woman under Hindu Law. Hindu Law applies to those who are born Hindus by religion. It also applies to Hindus by "race". Therefore, deviants from the Hindu faith will not shake off Hindu Law. An atheist will continue to be governed by Hindu Law if she/he was born a Hindu. There is no escape for a Hindu woman from Hindu Law. Sanskrit texts did not apply to the Shudras, as they were not addressed to them. They were thus free to evolve their own customs. But all that is now history. The statutory definition of Hindu includes Hindus of all castes — in fact anyone who is not a Muslim, Christian, Parsi or Jew is a Hindu. Sikhs, Jains, Arya Samajists and Buddhists are also governed by Hindu Law. Such is the liberating influence of post constitutional Hindu Law, that it applies one law to all castes and that is the law of the upper castes.

The Caste Disabilities Removal Act, 1850, sought to remove disqualifications upon conversion from the Hindu religion or being removed from the caste. But such disqualifications have been reintroduced in some of the post independence codified law. Conversion of a Hindu attracts disabilities. Moreover, since religion continues to be the basis on which Personal Law is applicable, the disability attached by that religion will continue to apply to a person governed by Personal Law — unless altered by statute. Marriage, divorce and succession are the last refuge of Personal Law — and of fundamentalists — the only branch of law in which they still have a role to play. Since marriage, succession and divorce intimately affect the rights of women, control of women is of primary importance to the fundamentalists.

To understand the status of a Hindu woman, it is necessary to understand the concept of marriage — for that was her reason to exist: to marry and procreate a son. Marriage was considered a sacrament and divorce was not known to Hindu Law. Widow re-marriage was disallowed. Polygamy was lawful until abolished in 1955.

Maintenance Rather Than Ownership

As divorce was unknown, married women had the right to maintenance for life. They had the right to reside in the matrimonial home. A widow had the right to be maintained out of the joint family property of her husband's family. A woman had the right to reside separately and be maintained, if her husband ill-treated her. The right to maintenance arose out of her status as a wife.

In fact, the concept of maintenance becomes relevant and arises in a situation in which a woman is legally debarred from holding and owning property. Hindu women had no right to property. They were not coparcenars along with their brothers in ancestral property. On marriage, they were "transferred" to the husband's family but did not become owners of their husband's coparcenary property. But they did become members of the husband's Hindu joint family which gave them certain valuable rights against the property of the joint family.

The right to maintenance is therefore an aspect of their status as members of a joint family and, in a subordinate sense, is a proprietary right arising out of the status of marriage. It was the logical consequence of "no divorce". Marriage gave birth to personal and property rights for women. Maintenance was a substitute for the right to property. Maintenance and arrears of maintenance could be made a charge on property. Case law in the pre-1955 period is full of reported decisions on the claims of women to specific and specified property being charged in favour of wives and

widows in lieu of their claim to maintenance. After 1955 there are hardly any reported cases creating a charge on property, although S. 25(3) of the Hindu Marriage Act authorises a court to create such a charge. Unmarried daughters had a right to be maintained by the joint family. Their marriage expenses were a charge on the joint family's property. Any partition between male coparcenars was bound to make a provision for such expenses.

The rights of women to property differed depending on whether the property was self-acquired or joint Hindu family property. A woman had no claim to the self-acquired property of her father-in-law but had a right to be maintained out of the ancestral joint family property. The rights of widows in Hindu Law occupy an important place — this again is traceable to the fact that divorce was not permissible and a woman was therefore either a wife or a widow. A widow was entitled to be maintained out of her husband's separate property and joint family property. The Hindu Widows Remarriage Act, 1856 was passed to enable widows to remarry. However, it specifically states that upon remarriage, a widow will lose all rights to her late husband's property. Remnants of this law are seen today in the Hindu Marriage Act which says that on remarriage a court may stop payments of alimony [S.25 (3)].

Wives could not claim partition, but if there was a partition at the instance of a male member, they got the same share as a son. The Hindu Women's Right to Property Act, 1937 introduced by far the most wide reaching changes for women. It provided that on the death of her husband, a Hindu widow would get the same share as a son in the separate property of her husband. She would also get the same interest as he had in the joint family property. However, she got what was called a limited interest. This meant that a woman could use and enjoy her husband's property but she could neither sell it nor will it away. It would go back to her husband's joint family on her death. She could in certain circumstances sell it out of necessity.

Divorce, a Regressive Step for Women?

Streedhan was the absolute property of a Hindu woman. It is property given at the time of marriage, or that which is self-acquired by self assertion. Property gifted to her is her *Streedhan*. Arrears of maintenance is *Streedhan*. The Dowry Prohibition Act, 1961 abolished the giving and taking of dowry. The connection between Dowry and *Streedhan* has not been clearly spelt out but it would seem that property given voluntarily at the time of marriage would be *Streedhan*, whereas property given on demand in connection with marriage is dowry. With the introduction of the

right to divorce in 1955 under the Hindu Marriage Act, obviously, a woman lost all such rights as she might have had in joint family property as a wife or as a widow. On divorce, she no longer has the status of a wife and with the loss of that status, she suffers the consequent loss of all rights which arise on her being a member of the joint family. Thus for example, there is no longer any obligation to maintain her, by the husband or the joint family, she loses her right to separate residence. All that the 1955 Act does is give her a right to apply to the court for alimony which may be given to her, having regard to her means and the resources of her husband. This is not a matter of right. Thus the introduction of divorce in Hindu Law has not had a "liberating" influence on women but has been a process of impoverishment — a good example of the feminization of poverty. Divorce is a turning point in Hindu Law, altering the status of women for the worse. The 1955 Act introduced the "separate property" regime with a vengeance by freeing the joint family of any liability to wife or widow.

The Hindu Succession Act, 1956, does not abolish the Hindu Undivided Family (HUF) or the coparcenary. It sets down an order of succession to all property including the joint family property. On death, there is a deemed partition of a Hindu male's property which devolves on male and female heirs including his widow. Female heirs inherit as daughter and as widow. But the Hindu Succession Act also made it possible for a man to make a will of all his property, separate and joint family, whilst earlier he could not will away the latter. Thus a man could disinherit his daughters and wife. There is no compulsory statutory share that comes to a wife. There is no law that says that she cannot be disinherited. Under uncodified Hindu Law a man could not will his share in joint family property. The position of Hindu women in this respect has worsened. The combined impact of divorce with its consequent loss of property rights and the fact that a female heir can be disinherited has led to the degradation of the status of Hindu women, all in the name of reform. This is what we mean by saying that reform has led to the impoverishment of women.

This brings us to a discussion on the statutory law on marriage and divorce. The Hindu Marriage Act, 1955 made divorce possible for Hindus for the first time. As of today, grounds for divorce are extremely liberal. Cruelty is a ground for divorce and courts have interpreted this ground very liberally. One might almost say that courts have introduced irretrievable breakdown as a ground for divorce through the back door. Under S. 25, a woman may — so may a husband — a concept unknown to Hindu Law — apply for alimony. The Hindu woman has traded off her rights against the joint family — a right enforceable against all assets of the joint family and enforceable against a third party who purchases Joint Hindu Family

property and available for life, capable of being secured as charge on property — for the dubious right to divorce!

The Indian Divorce Act borrows from the 1897 English Act. Since joint property was not the norm of British property law, the Indian Divorce Act was based on the "separate property" regime. All that a divorced wife had was a right to alimony. Alimony *pendente lite* cannot exceed one-fifth of the husband's average net income. Permanent alimony is payable during the lifetime of the husband.

Divorce is a concept known to Muslim Law. It may be at the unilateral instance of the husband. A woman has to file a petition under the Dissolution of Muslim Marriages Act, 1939 which contains no provision for payment of maintenance. The now famous controversy after the Shah Bano case led to the passing of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 under which a woman is entitled to maintenance for the *iddat* period plus a reasonable and fair provision. Whether such provision is for life or for the period of *iddat* only remains unresolved. A Muslim woman does not acquire proprietary rights in her husband's property on marriage. The joint family is unknown to Muslim Law. But it is arguable that on divorce she was entitled to a "reasonable and fair provision".

Under the Parsi Marriage and Divorce Act, 1936, the court can grant alimony pending a petition. The court can award final alimony having regard to the means of the wife, her needs and her husband's income. This obligation to pay is limited to the lifetime of the husband. The widow cannot lay claim against the estate. This Act too is based on a regime of separate property. During marriage, a wife has a right to reside in the matrimonial home.

The Special Marriage Act, 1954 is the only available piece of legislation under which people from two different religions can get married. However, if a Muslim marries a Hindu under this Act, his Personal Law will not recognise such a marriage as valid. Marriage by a member of an undivided family under this Act effects a partition. Succession to property of those who marry under this Act is governed by the Indian Succession Act, 1925. In 1976 the Act was amended to provide that if two Hindus marry under this Act, such a marriage will not effect a partition. Succession to his or her property will continue to be governed by the Hindu Succession Act, 1955. A woman can apply for alimony on divorce which is given at the discretion of the judge. This Act too has no concept of joint property for women nor does it empower courts to transfer the property of the man to the wife on divorce.

No Right to Property of Husband

Contrary to popular understanding a woman in India acquires no right on marriage to the property of her husband. On divorce, courts have no power to order division or distribution of her husband's property. And that is the reason why the Maharashtra Government proposal to introduce joint property is an appropriate occasion for us to discuss all marriage laws. What is proposed is to move to a regime of "community of property". Several states in the U.S. have introduced such laws. Basically all property acquired after marriage is jointly held by husband and wife, regardless of title. The system recognises that marriage is a partnership in which both spouses contribute equally. On dissolution of marriage both parties share marital property equally. Although England continues to have a separate property regime, the courts have extensive powers to reallocate property on divorce in a manner that is equitable. Thus for example the court can direct that the husband transfer the family home to the wife. There are extensive protections for the right to occupy the family home. In the U.S. those states that have not accepted the "community of property" regime have adopted the "equitable distribution" rule, which enables the court to distribute property between husband and wife on divorce. The wife's contribution to home making is a specific factor to be taken into consideration while distributing property on divorce. In India, we have adopted neither system — leaving the Indian divorced woman to her fate as "destitute" and this in a country which has no social welfare system.

"Community of Property" for Hindus Only.

The question that must now be asked is "can such a regime be introduced only for Hindus"? The new law seeks to effect a *sui generis* change in the matrimonial property regime. Its prime justification is the recognition of the contribution made by a woman, which may be either monetary or non-monetary to the acquisition of marital assets. It involves a recognition of equal rights for women in marriage. Marriage is a recognised institution for women of all religions and the contribution that women make to the institution is common — regardless of the religion to which she belongs. How then can a benefit be conferred on a married woman of one religion and not on another? Such conferment of benefits would be blatantly discriminatory based on religion alone. The Constitution of India guarantees the right to freedom of religion, but the conferring of a benefit on women cannot be said to be an interference with religion. On the contrary, religion is a prohibited classification under the Constitution. Not conferring such a benefit would violate their right to freedom of religion. For a woman will be told, you are free to practice your religion,

but if you do, you will not be eligible for this benefit. Must a woman then opt — either for her religion or for marital property? She would be required either to renounce her religion or marry, not under her Personal Law, but under a special law — a course which may deprive her of her rights under Personal Law. It is precisely to avoid such consequences that the Caste Disabilities Removal Act, 1860 was passed. A Common Civil Code is a felt necessity to avoid disabilities which attach to a person by virtue of religion — something which the 1860 Act sought to do.

So long as the system of laws applicable on the basis of religion continues, different laws will apply to different women. But when the state intervenes to regulate on the subject of marital property, it cannot single out women of one community for benefits. A colonial state, with limited legislative powers and with no obligation to guarantee fundamental rights could afford to continue to divide communities on religious lines. But a sovereign democratic state can have no such justification. A state acquires its powers to bind citizens by its laws by virtue of the fact that they are citizens or nationals of the state — not because they belong to a particular religion.

The state amendment will lead to a conflict of laws problem. For example, will a marriage solemnised in Delhi be governed by the Maharashtra Law if the parties reside in Maharashtra, or if the property is situated in Maharashtra? These are basically manageable problems with reference to conflict of law rules. The law can apply to people domiciled in the state or marriages solemnised in the state. Anything is possible people might migrate across the border to marry, but these are problems which can be dealt with. The best thing of course, would be for the Central Government to legislate on the subject — but then who has the time for women's issues? And what about the vote banks that might vanish in the bargain?

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Rabindra Hazari

Wife's Right to Reside in the Matrimonial Home

DOES A HINDU WIFE HAVE A RIGHT to reside in the matrimonial home? No, says Justice S.M. Daud of the Bombay High Court in *Sagarmal Pukhraj Jain (Sanghvi) & Ors. v/s. Naina Indirmal Jain & Ors.* (Appeal from Order No.1003 of 1986, dated 12th December, 1986 Unreported).

In this case, after being married for five years, the wife was driven out of her matrimonial home in 1984. She took refuge with her parents. In 1985, the death of their minor son effected a reconciliation for two months. Thereafter, in desperation, the wife tried to re-enter her matrimonial home. As entry was refused she spent the night outside the home. The next day the wife entered her matrimonial home. Shortly thereafter, she secured ad-interim orders restraining her husband and others from throwing her out or interfering with her free access to the premises.

Wife's Re-entry And Public Disorder

In appeal, Justice Daud vacated the ad-interim injunction. Justice Daud held that the wife's re-entry into her matrimonial home amounted to "forcibly capturing the premises". The wife had argued that the premises was the matrimonial home in which she had the right to reside. The fact that she had been kept away from the place for two years made no difference to her right to come back and recommence living in the matrimonial home as and when she wanted. Justice Daud held that "if this argument was accepted in all its implications, it would be impossible to prevent public disorder on a very wide scale. Today it is a case of a wife entering her alleged matrimonial home. Next, it will be others, including persons with all sorts of claims, existent, bonafide, dubious and dishonest. A state subject to the rule of law, and India certainly is one, cannot permit this to

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happen — nay, not even in the name of feminism or for protection of the deserving."

Justice Daud, however, noted that it was not known whether the matrimonial home was owned by a joint Hindu family or the husband alone. This was important as "the question as to who the owner is and who is in possession, would make a great difference to the right of an abandoned wife".

English Law

However, the decision is quite contrary to established law. As the right to reside in a matrimonial home is not provided for by a statute — resort has to be taken to common law — hence English Law. The English Courts have so fashioned law as to give women personal and proprietary rights which never existed before. The Christian Church always insisted on the obedience of a woman to her husband. The Canon Law of the Church translated this precept into a legal obligation. Moreover, upon marriage all the wife's property automatically belonged to her husband. Lord Denning observed in *Bendall v/s. McWhirter* [(1952) QB 475] that under the old common law the wife "had no rights at all apart from those of her husband. She was treated by the law more like a piece of his furniture than anything else. The husband could not sue her in ejectment or trespass, but neither could he sue a piece of furniture. He could bundle his furniture out into the street, and so he could his wife. The law did not say him nay."

However, by various Acts of Parliament, especially the Married Womens' Property Act, 1882 women were entitled to own and dispose of property separately from their husbands. In the post-war years it was under this Act that the further question as to whether a wife has the right to reside in the matrimonial home was decided.

In 1942, in *Bramwell v/s. Bramwell* [(1942) I KB 370 at 374], Goddard L.J held that the husband's only way of getting his wife out of the house was to make an application under S. 17 of the Married Women's Property Act, 1882. This section gave the court a very wide discretion in the matter. Accordingly in *H v/s. H*, when a husband claimed that he had an absolute right to turn his wife out, it was held that he had no such right, but that it was a matter of discretion for the court. This was followed in *Stewart v/s. Stewart* [(1948) I KB 507 at 573]. It is now settled law in England that a deserted wife has rights as against her husband to stay in the matrimonial home unless and until an order is made against her under S. 17.

A major problem was whether the right of the deserted wife was binding on the husband's successors in title. In *National Provincial Bank v/s. Ainsworth* [(1965) AC 1175], the Law Lords unanimously overruled a long

line of decisions by holding that, if the husband remained himself as the sole owner of the house, with the title vesting in him, he could not himself turn her out. She had a personal right as against her husband. But she had no equity in her favour. She had no right at all against any one else.

Matrimonial Homes Act, 1967

Public opinion demanded legislation to overrule the Law Lords decision. This led to the enactment of Matrimonial Homes Act, 1967. The Act protects a spouse who has no proprietary, contractual or statutory right to remain in the matrimonial home. Thus, the principal objects of the Act are to confer on the non-property owning spouse, usually the wife, statutory rights of occupation, which are made a charge on the property-owning spouse's estate or interest and can be registered, so that there is now better protection for the wife's occupation of the matrimonial home.

However, the position of a wife who was a joint owner with her husband was altogether on different footing. She was not covered by the Matrimonial Homes Act, 1967. As a joint owner, the wife had a legal right to own and occupy the house. However, in *Gurasz v/s. Gurasz* [(1969) 3 All ER 82] where the wife fled the matrimonial home with her children to escape from her husband's extreme cruelty, the court ordered the husband out of the matrimonial home, even though he was a joint owner and allowed the wife and children to return.

Under a recent legislation, the Domestic Violence Act, 1976, County Courts can grant injunction to protect a battered wife, even though the home is only in the husband's name and it belongs to him without her having a share in it. She can get an order excluding him from the house and even have him arrested if it is necessary for her protection. In *Davis v/s. Johnson* [(1979) AC 264] it was held that a woman living with the man together in the same house as man and wife has the same protection under the Act as a lawfully wedded wife.

Hindu Law

Under Hindu Law the right of a wife to reside in the matrimonial home is not explicit but it can be inferred from the provisions of the Hindu Adoption and Maintenance Act, 1954.

Section 18 of that Act deals with maintenance of the wife. A Hindu wife, whether married before or after the commencement of that Act, is entitled to be maintained by her husband during her lifetime. Marriage revolves around conjugal rights which require the spouses to live together in the same house, i.e. the matrimonial home. The maintenance of wife contemplated in S. 18(1) necessarily means maintenance in the matrimonial home.

This is the normal state of affairs. Over and above this, the Act contemplates under S. 18(2) an abnormal state of affairs whereby the spouses remain married but do not reside together and do not enjoy conjugal rights, yet the wife's claim to maintenance continues. Section 18(2) reads:

"A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance."

The right of a wife for maintenance is an incident of the status or estate of matrimony and a Hindu husband is under a legal obligation to maintain his wife. The obligation to maintain the wife is personal in character and arises from the very existence of the relation between the parties. The rule laid down in S. 18(1) cannot, however be said to be absolute although the right exists independently of the possession of any property by the husband, ancestral or self-acquired. (Mulla: *Principles of Hindu Law,* 14th Edn. pg.1017).

Thus the emphasis made by Justice Daud as to whether the matrimonial home is the self-acquired property of the husband or the Hindu joint family property should not obstruct the right of a wife to reside in the matrimonial home.

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Susan P. Mathew and Menaka Guruswamy

Hindu Widow's Property Rights: A Saga of Deprivation

ANY ATTEMPT AT ENDING DISCRIMINATION against women will necessarily have to see where this oppression originated. If one accepts Engel's conceptual analysis of the origin of the family, private property and the state, then one must concede that womens' subservient position, far from being a natural fact, was in fact socially constructed. The "subordinate position" of women came about through the same forces that created an oppressive class structure, the link being private property, supported by the patriarchal family and the patriarchal state.

Thus women and "private property" have an almost unholy inverse relationship. While "private property" gained importance and position, women lost both and paradoxically to some extent became private property themselves without the benefits. This article is based on the premise that the concept of private property is very much linked with the subordination of women and their exclusion from property matters has been deliberate. The aim of this article is to trace the link, examining the position of widows in particular. While doing so we have broadly focussed on (1) the rights and interests of widows under the Acts; (2) remarriage, unchastity and its effects on their rights; (3) alienation.

Hindu Widow's Remarriage Act, 1856

The inheritance rights of women, whether partial or absolute, are very intimately connected with an important aspect of conjugality, that is, widow remarriage.[1] Widow remarriage at first glance comes across as progressive, liberal and empowering for the widow in question. But scratch the surface and it is not what it seems. The Hindu Widow's Remarriage Act

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was passed by our colonial masters whose objects and reasons are suspect. When put in context, the Act was a vehicle by which the colonial state could in some ways reform Hindu society and, at the same time, keep the patriarchal stronghold within the "family", especially in relation to property relations, intact.

Widow remarriage no doubt has positive facets in the sense that the woman is able to contract a second marriage without the proscription of keeping her "husband's bed unsullied". To that extent it recognises some autonomy in sexual matters. But on the other hand, widow remarriage reinforces that a woman necessarily needs "male protection" which a second marriage facilitates. And by contracting a second marriage she becomes socially recognised once again. Thus widow remarriage is not free from gender bias and not necessarily the answer to the Hindu widow's problem. As will be seen later, it could be the cause of it.

Thus keeping in mind that the Act was not passed with all the good intentions we supposed and that widow remarriage is not really a panacea, let us see what the Act really has to say. The Act claims to remove all legal obstacles to the marriage of Hindu widows.[2] The preamble nobly states that this legal incapacity was not in accordance with established custom and that removal of this incapacity would lead to the "promotion of good morals and to public welfare". So what appears to be empowering for the widow is actually done in the larger public interest. It would not be too much to assume that perhaps remarriage would be a way of controlling her sexuality and therefore promoting good morals, and when seen in the light of the other provisions, of restricting her property rights.

Section 1 of the Act legalises the marriage of Hindu widows. Section 6 provides that ceremonies constituting a valid marriage are to have the same effect on a widow's remarriage. Thus the marriage was legally sanctified. But now the Act shows its nasty face. Section 2 of the Act states that whatever rights and interests the widow may have had in her deceased husband's property (by maintenance, inheritance, will, testamentary disposition) which conferred on her, without express permission to remarry, limited estate with no power of alienation, shall on remarriage cease and determine as if she had then died, and the next heir of the deceased husband would be entitled to the same.

What strikes one is that the disability removed in S. 1 is defeated by the disability imposed in S. 2. Section 2 has to be read with S. 5 of the Act which states that she forfeits her property rights in her deceased husband's estate if S. 2 is fulfilled. On paper the provision reeks of bias, of double standards and an inability to come to terms with a woman being a "fresh stock of descent". It also ties the widow down. If she remains single, she retains her

property; if she remarries, she loses all rights of inheritance.

To see exactly how this kind of a law can in fact cause problems for widows, one must see the experience in the areas of Punjab and Haryana.[3] The custom of widow remarriage in the area is known as karewa, chaddar, andozi, etc. Karewa is essentially a levirate marriage which could be anything from throwing a white sheet with coloured corners over her head to placing glass bangles on her wrist. The widow is generally married off to the younger brother of the deceased husband who in many cases is much younger than her. If there is no younger brother, then she is married off to the elder brother or an agnatic first cousin. The significance of such a marriage is that it was used as a means to retain landed property in the family.[4] Remarriage thus deprived the widow of even her limited interest. This is a classic example of how the woman is put into a no-win situation.

If under S. 2, the widow is able to prove that a "special custom" is prevalent in her caste or community which permits her to remarry without forfeiting her property rights in her deceased husband's estate, she need not forfeit. But the custom in many cases requires her to remarry her husband's brother. So if she remarried and there was no special custom saying "no forfeiture", on the condition that the property would stay within the family, she would still lose.

The British in this situation encouraged widow remarriage within the family itself and behaved with an extreme patriarchal familiarity.[5] But to that extent the 1856 Act did not really make a distinction between remarriage within the family and "outsiders". It was the practice that made this distinction and the administration reinforced it.

This way the widow's right as to whom she could marry was severely restricted and the purpose of the Act was defeated as the basis of the marriage would not be consensual in a majority of the cases. The control of a widow's remarriage by the deceased husband's family, aided by the British, led to a resistance by the widows. This resistance came in the form of petitions denying that karewa had taken place. Thus the widow was called an unchaste woman but retained her inheritance. The male members, on the other hand, would go to any length to marry the woman and keep the property. By being unchaste, she was denied social recognition but gained a freedom from control, both economic and sexual. What is important to note is that in a society where negative branding is most often done on the woman — calling her "unchaste", her children "bastards" — the reason for this is nothing more than her property sensibility being outraged. But despite this resistance the rule for the widow was levirate marriage.

The experience gives valuable insights into how the law can in fact create negative situations especially for the woman. The 1856 law is in this

manner doubly oppressive: it takes away her right of property at the point of remarriage. and, on paper and in implementation, it makes widow remarriage attractive for everyone but the widow.

After the law was passed, the judiciary was not exactly silent. The cases can be classified under the broad headings of 1) Rights and interests of widows 2) Effects of alienation.

1. Rights and interests of widows: Remarriage even by custom extinguishes her estate in the property of her deceased husband.[6] If the widow pleads a custom permitting remarriage and non-forfeiture and fails to establish that custom, the operation of S. 2 cannot be resisted. Thus the onus is on the woman to prove the custom of non-forfeiture. She is not entitled to sue for partition of her deceased husband's share. The words, "if she then died" indicate that the section applies to "limited estate".

Forfeiture is only confined to categories of cases under S. 2. For the application of S. 212, strict proof of marriage is necessary .[7]

2) Effect of alienation: If she alienates any portion of her husband's estate for a purpose not binding on reversioners and the estate later terminates on remarriage, the alienee's interest also terminates on her remarriage.

It is evident from the wording of the Act, the object of the colonial state, the implementation of the Act and subsequent oppressive practice and judicial trends, that the law was not pro-widow at all. In many ways it harmed more than it sought to benefit. Or maybe it did benefit those who it sought to. Maybe the law was made for the male relatives alone, to allow retention of the property within the household and to keep the land within the bloodline. The law could probably claim not what it originally intended i.e. removal of obstacles to widow remarriage, but the true claim of patriarchal maintenance. The Act was repealed by the Hindu Widows Remarriage (Repeal) Act, 1983 probably because provisions such as S. 2 were already repugnant to provisions in the Hindu Succession Act, 1956 and the law had outgrown its usefulness (if it had any to start with). The law is repealed but one wonders how much of the policy behind the law still exists in today's setting.

The Hindu Women's Right to Property Act, 1937

The 1937 Act was the outcome of discontent expressed by sizable sections of society against the unsatisfactory state of affairs concerning women's right to property. According to Dr G.V. Deshmukh, the author of the Hindu Women's Right to Property Bill, "subservience of women to men was purely out of ignorance, prejudice, superstitions and what was more,

lust and self interest on the part of the men. Everything was masqueraded under law and religion and under that cloak all sorts of practices, which were repugnant and foreign to the principles of Hindu Law, were introduced." [8]

Dr G.V. Deshmukh was highly critical of the decisions of the Judicial Committee of the Privy Council when it held that in respect of property got by inheritance,[9] or on partition,[10] a woman could have only a limited estate, that is, she could enjoy the fruits of such property only during her lifetime and had no right to alienate it *inter vivos* except for her maintenance or, to a small extent, for a pious religious purpose.[11] He then highlights the "disabilities" suffered by the English judges who could not believe that Hindu Law gave absolute right to property to women, viz. *Streedhan* whereas in England, until the Married Women's Property Act, 1882 was passed, the husband was the sole owner of all property. The efforts of the English judges to understand Hindu Law on this point was thwarted by the Pundits who claimed the ability to interpret the law. They pleaded non-availability of the texts and other relevant material in English language. The result was that the right of a woman to property was practically taken away and most of Mitakshara law was abrogated so far as the Hindu widow was concerned.

Subsequently a Bill was introduced in the Legislative Assembly on September 26, 1935.[12] The Bill espoused the cause of equality of property irrespective of sex. It also specifically provided that in the event of a Hindu dying intestate, the wife, mother, daughter and wife of a pre-deceased son along with the son would all have equal share in the property. Significantly, the Bill which equated the status of women to that of men, made women the absolute owners of property.[13]

The Bill was attacked and its antagonists criticised it on the grounds that it would cause disruption and disharmony in the family. They believed that it was not advisable to give absolute power to women who had been brought up under the age old tradition of tutelage.

It was thought that to give the widow absolute control over property was to expose her to the scheming machinations of unscrupulous people. One member of the Legislative Assembly suggested that it would have been better if Dr Deshmukh, eminent surgeon, "had left the work of reforming Hindu Law to some lawyers."

An amended version of the Bill was eventually enacted as the Hindu Women's Right to Property Act, 1937. As per the Act, a widow was entitled to a limited interest over the separate property of her husband — what has been termed as Hindu widow's estates.

The Act came into force on 14th April, 1937 and was later amended by the Hindu Women's Right to Property (Amendment) Act, 1938. Subsequently the Federal Court held that the Central Legislature had no power to legislate with regard to agricultural land in a Governor's province and that, as a consequence, the aforesaid Act did not operate to regulate succession to such land in Governors' provinces, but operated only in respect of other kinds of property. The Act therefore does not confer upon the widow of a deceased Hindu any interest in agricultural land.[14]

As per S. 3 of the Act, if a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or customary law dies intestate leaving separate property, his widow shall be entitled to the same share as the son. Though the interest devolving upon the widow under S. 3 was a limited estate, she was given the same right of claiming partition as a male owner had, which was a remarkable achievement as such a right had never been recognised before. The Act replaces the rule of Hindu Law recognised in all the states except in Madras, where it became obsolete as a widow was entitled to a share when her sons or stepsons actually divided the estate between themselves. Under the Act, the widow gets a right to a share equal to that of the son or stepson, independent of partition. Moreover it renders obsolete the older rule that a widow succeeds only in absence of male issue. The Act makes a widowed daughter-in-law and a widowed granddaughter-in-law entitled to a share along with, or in default of, the main issue and the widow. It brings the Mitakshara and the Dayabhaga system closer together by conferring upon the widow of a member of an undivided family the right to inherit his coparcenary interest. And in every case she will be entitled to enforce partition.[15]

The Act had some far-reaching consequences especially on Mitakshara coparcenary. The Act facilitates inheritance of separate property of the husband by his widow along with male issues. In a Mitakshara undivided family, the widow of the deceased coparcenar will have in the joint family property "the same interest as he himself had". This abrogates the rule of survivorship and makes the undivided interest of a coparcenar pass to his widow even when he leaves male issue. The Act takes away the rule of survivorship and confers on the widow the right to claim partition as a male owner. The widow however does not acquire full rights of a coparcenar, only a Hindu widow's estate. Since the right is that of limited interest, after the death of the widow, the property reverts back to the husband's heirs.

There are divergent views with reference to the unchastity of the widow as a disqualification to inheritance. Some courts have held that it is a disqualification whereas others have held it is not.

Amid much controversy the courts held that the widow had the absolute right to alienate her undivided interest for legal necessity for her lifetime only.

The Hindu Succession Act, 1956

The Hindu Succession Act can in many ways be seen as the stick to beat the patriarchal household with. How effective the beating is can be gauged only after studying the provisions of the law and whether the case law has in fact improved the situation.

The law for the first time tried, at least on paper, to address gender inequalities in the area of inheritance. The main scheme of the Act is:

1. To establish equality between male and female in regard to rights to property; hence limited estate converted to absolute one, the woman being absolute owner.

2. The Act recognised female heirs other than the widow and strengthened the widow's position.

3. A further innovation was the principle of simultaneous succession of heirs of a certain class.

4. In the case of the Mitakshara Coparcenary, the principle of survivorship applies but if there is a female in the line, the principle of testamentary succession is applied so as to not exclude her.

Grounds for disability such as remarriage, conversion and unchastity are no longer countenanced under this Act.

Section 14 of the 1956 Act

Under the old Hindu Law there was *Streedhan* which was the widow's absolute property and other inherited property which she was entitled only to a life estate with very limited powers of alienation, if at all. Even under the 1937 Act, the concept of "limited estate" continued. The object of S. 14 of the Hindu Succession Act is two-fold (1) to remove the disability of a female to acquire and hold property as an absolute owner, and (2) to convert the right of a woman in any estate already held by her on the date of the commencement of the Act as a limited owner, into an absolute owner. No artificial limitations would be put on her right of ownership. Under S. 14(1) the word "property" presupposes that the woman had a limited right in the property.

The provision is retrospective in the sense that it enlarges the limited estate into an absolute one even if the property was inherited or held by the woman as a limited owner before the Act came into force.

The section includes movable and immovable property. It was held by the court that the word "property" occurring in S. 14(1) does not mean specific property or specified property. If it is so interpreted, that section would lose much of its force and the object of S. 14(1) cannot be avoided merely on the ground that the widow did not file a suit for partition. The word "possessed" is used in the broad sense in the section. The property need not be in actual possession of the female. It will be sufficient if she had a right to recover possession according to law. Constructive possession is permitted, as long as there is a right to possess. Subsection (2) is an exception to subsection (1).[16] Both subsections speak of gift, will or any other instrument by which any property might be acquired by a female Hindu. Subsection (1) speaks of property possessed by a female Hindu whatever the manner in which the property was acquired by the date of the Act. Therefore, limited estate before the Act converts to absolute estate. However, if a widow acquires property after the Act with a restricted estate, subsection 2 applies. This acquisition might be under the terms of a gift, will or other instrument or a decree, or order or award.[17] However, subsection (2) applies to instruments, decrees, awards, gifts etc. which create independent and new title in favour of females for the first time and has no application where the instruments concerned merely seek to confirm, endorse, declare or recognise pre-existing rights.

Though remarriage is not a general disability under the Act, there is an exception to this norm. Section 24 of the 1956 Act speaks of three categories of widows who would forfeit their right to the property if they remarried before the Act came into force. These three categories are: (1) widow of the pre-deceased son; (2) widow of a pre-deceased son of a pre-deceased son; (3) widow of a brother.

In regard to widows other than the three categories mentioned in this section, if they are otherwise entitled to inherit either by reason of their marriage or by blood relationship, they will not be disentitled to inherit if they remarry before the commencement of the Act.[18]

Section 6

This section has probably raised more controversy than the entire Act put together. The section is headed "devolution of interest in coparcenary property". The first part of the section clearly affirms the principle of survivorship for a Mitakshara coparcenar and, in the second part, specifies circumstances where the property would be passed on through testamentary succession.[19] The circumstance is the female in the line, a chink in the coparcenary armour, which probably was the reason for so much controversy. The Hindu Succession Act is remarkable in the sense that it has gone

ahead with bold reform in bold print.

The essential difference between the way the widow is treated as regards coparcenary, under the 1937 Act and the 1956 Act is this — in the 1937 Act, a Hindu widow could not be a coparcenar though she had coparcenary interest and was also a member of the coparcenary by virtue of the rights conferred on her.[20] But the interest was limited as only a woman's could be. But under the 1956 Act, by reason of S. 14, the woman's estate has become an absolute one and she is finally seen as a fresh stock of descent.[21] The term fresh stock of descent, it must be noted here, is not free from gender bias and tends to sound like a futuristic breeding farm. But for a lack of a better way to put her position in words, one needs to use terms against themselves.

When the proviso to S. 6 applies, there will be no disruption of joint family status. The proviso creates a fiction so that persons who are to inherit are identified. It does not affect the disruption of a coparcenary, which should put the coparcenars' worries to rest.

The anomalies in this section are that it is not very clear what will happen to the widow's interest guaranteed under the 1937 Act in relation to a coparcenary. There are conflicting views. One view is that S. 6 uses the word "male" and therefore the woman's estate should be under S. 15 and 16. Others feel this is unresolved. There seems to be confusion as to which heirs would in fact inherit, as having "survivorship" and "succession" in the same band wagon causes problems especially in relation to the time of the male coparcenar's death.[22]

The precise effect of the notional partition (Explanation 1) is that she would be entitled to the fictional partition to ascertain her husband's interest[23] in addition to being able to claim what she would take as an heir to her husband's interest. Explanation 2 talks about coparcenars who separated before the deceased's death. A female who was never given the status of a coparcenar has, on succession, to separate from the coparcenary. Thus a widow who took her husband's share (coparcenary) on his death (after the 1956 Act) and who lives jointly with his father and brother, can claim a share in the estate of her father-in-law as a Class 1 heir.[24] However, it must be stated that there are conflicting opinions.

Conclusion

For a formal right to transform into a substantive one, social reform must move with the reform of the law. And in areas such as rights and inheritance, no law reform will go far, especially laws like the 1956 one, if structures such as patriarchy are not given due attention not in terms of exposing them for what they are, and countering their effects.

Now that women have got absolute rights, widow remarriage returns seeing that they remain in the bosom of their deceased husband's family and safely under their control. But the law has given some security for women and widows in particular. May be it is time that the concept of "matrimonial property" is introduced. And that way, what she gets is not mere inheritance but what she has put into her married life and what she deserves.

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P.M. Bakshi

Partition Rights of Female Heirs

A CONFERENCE AND SEMINAR recently held on the subject of women's status has brought out certain anomalies regarding their rights in land. It has, for example, been pointed out that in many states, women are totally debarred from inheriting agricultural land. The excuse is that land should not be fragmented.

The Hindu Succession Act, enacted in 1956, has considerably enlarged the succession rights of women and improved their economic position. It has recognised women as full heirs in all situations and tried to introduce equality with men in matters of succession. It has also introduced a uniform law of succession amongst Hindus. However, while maintaining equality of the sexes in its general approach, the Act contains one provision which has created serious problems and seems to need amendment.

Rights in Dwelling House

Section 8 of the Hindu Succession confers rights of inheritance on certain female heirs. But S. 23 imposes a restriction on the right of women to ask for the partition of the "dwelling house". Section 23 of the Hindu Succession Act provides that where a Hindu intestate has left both male and female heirs (specified in Class-I of the Schedule) and his or her property includes a dwelling house wholly occupied by members of his or her family, then the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein. The section further provides that the female heir shall be entitled to a right of residence therein.

But there is a "proviso", which lays down that where such female heir is a daughter she shall be entitled to a right of residence in the dwelling house only "if she is unmarried or has been deserted by or separated from husband or is a widow".

Section 23 appears to be based on a policy decision of the legislature, that the family dwelling house should not be fragmented amongst the co-sharers unless all of them consent. However, the veto given by the section to the male sometimes creates problems and may lead to serious injustice to females, particularly daughters. In particular, difficulties arise where there is only one male heir, along with one or more female heirs. Can the male heir still resist the desire of the female heir (or heirs) to seek partition?

There exist two conflicting views on the subject — what may be called a "narrow" and a "liberal" view. The narrow view is represented by the judgements of the Calcutta and Madras High Courts. In the view of these two High Courts, a female heir cannot ask for partition and has to wait for her share until her brother chooses to divide the house. As against this, the High Courts of Bombay and Orissa (taking a liberal view), hold that the section does not apply where there is only one male heir. In such a case, these High Courts would allow the female heir to claim partition of the dwelling house.

The matter has been considered at length in a decision of the Bombay High Court. It holds that where a Hindu male dies intestate, leaving only one male heir and other female heirs, the female heirs can claim partition of the family dwelling house and S. 23 of the Hindu Succession Act is no bar to such a claim. It agreed with the decision of the Orissa High Court, which held that where there is a single male heir along with female co-heirs, the females can demand partition, whether or not the male heir is agreeable.

The Bombay High Court dissented with the view of the Calcutta and Madras High Courts on the subject. It should be mentioned that even according to the Madras High Court's view, if the male owner sells his share, the house ceases to be a "dwelling house", since the stranger-purchaser would then be an intruder into the family and S. 23 of the Hindu Succession Act would not apply.

It is obvious that the present section may cause hardship, if a rigid construction is placed on it. This has been noted even by the Calcutta and Madras High Courts. The Madras High Court has observed that there are certain cases where the section may cause injustice — for example, where the intestate has left only a big mansion in the form of a dwelling house (and no other property), and is survived by a single male heir and one or more female heirs. In such a case, even though the female heirs are entitled to a share in the intestate's property, the right is practically frustrated, since there is no possibility of the single heir choosing to divide the property. The female heir's right to partition may thus be postponed forever and may even be ultimately frustrated.

Suggestion for Amendment

It is felt that the rigour of S. 23 should be softened by excluding from its scope, cases where there is only one male heir. In other cases also, the court should have the discretion to permit partition, if the justice of the case so demands and to that extent also, the section needs change. The matter can be settled by adding the following subsection to S. 23:

"(2) — The provisions of this section do not apply:

(a) where the number of male heirs does not exceed one, or

(b) where, though the number of males exceeds one, the District Court, on a petition made to it for the purpose, directs that, in the interests of justice, the provisions of the section should be dispensed with, in the particular case.

(3) In arriving at a decision for the purpose of clause (b) of subsection (2) the District Court may have regard to the hardship likely to be caused to any of the heirs, if a direction under that subsection is not given."

Divorced Daughter

There is one more point to be noted regarding S. 23. While denying the right of partition to the female heirs, the section gives them a right of residence in the family dwelling house. This is a good provision and is in advance of the earlier law. The right has been conferred by the section even in the case of a dwelling house which is not ancestral. However, the right is confined to an unmarried daughter, or a daughter who has been deserted by her husband or who has been "separated" or is a widow. Curiously, the section makes no provision for a divorced daughter.

A divorced daughter should really be regarded as standing on a higher footing than a separated daughter as she has little chance of re-joining her husband. The law requires to be clarified on this point. Clarification is also needed to give the right of residence to a daughter who, while having a married status at the time of her father's death is subsequently deserted by her husband or is separated from him or becomes a widow, or is divorced. This will require amendment of the proviso.

It may also be pointed out that the benefit of the provisions of the Act (such as they exist) is not available to persons belonging to Scheduled Castes and Scheduled Tribes, because S. 2(2) excludes them from the scope of the Act. In this respect, the Hindu Women's Right to Property Act, 1937 did not exclude those castes from the scope of that Act.

(From, *The Lawyers*, April 1988).

Part Six

Courts

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Nilima Dutta

Family Courts

THE FAMILY COURTS ACT, 1984, allows all disputes relating to family matters such as divorce, maintenance, guardianship and custody to be heard and settled in special courts called Family Courts. Wherever there are Family Courts set up, one has to file a case relating to Family Law, there and there alone.

Matters which must go to the Family Courts:

(1) Any suit for divorce or annulment of the marriage. (2) A suit for restitution of conjugal rights. (3) A suit for judicial separation. (4) A suit for declaration of a marriage. (5) A dispute between husband and wife regarding property. (6) A suit for maintenance which includes applications under S. 125 of the Criminal Procedure Code. (7) A guardianship petition. (8) An application for custody of or access to any minor. (9) An application for an injunction against the wife or husband.

Injunctions

There are no laws conferring ownership of property on women automatically because of marriage. The relationship of marriage allows the woman to live in the home with her husband. Such a place of residence is called a matrimonial home. Other family members may also reside there. A woman may find herself thrown out on the street at any time by a husband. This is more common when husbands are violent towards wives. The first step to be taken is to contact a women's organisation and lodge a complaint at the nearest police station. The police may allow the woman to re-enter the matrimonial home. It is best to get a court order for:

1) Re-entry into the matrimonial home.

2) An order restraining or stopping the husband from throwing the woman out of the house.

3) An order preventing the husband from harassing the woman.

An order of a court preventing a person from doing something or compelling a person to do something is called an injunction. The injunction orders are granted under common law, the Specific Relief Act and also under the Civil Procedure Code. Injunctions can be given on a temporary or permanent basis.

Marriage does not give the woman ownership rights of the matrimonial home. But since she is married, she gets a personal right to live in the home and the court will protect her right to stay there by granting an injunction. If the woman has acquired the matrimonial home partly or wholly from her income or her own resources, she automatically has ownership rights and cannot be dispossessed.

Procedure

An application for an injunction can be made:

1) By filing a suit in a civil court under the Civil Procedure Code or Specific Relief Act.

2) By making an application in the Family Court or in a civil court where a matrimonial case has been started. The application must give full names and addresses of both parties and give details of the acts of cruelty and reasons why the injunction ought to be granted. The court fees are usually nominal. An injunction can be obtained on grounds of urgency even in the absence of the husband, but a copy of the application must be given to him later on.

Domestic Violence and Injunctions

Injunctions can be granted by the civil courts after a matrimonial proceeding is filed. If there is no matrimonial proceeding, civil courts can also grant injunctions under other civil laws such as the Specific Relief Act or also under the Civil Procedure Code.

When women ask for injunctions from the civil courts, a suit has to be filed. Court fees have to be paid. The rules of filing a suit have to be conformed with. It is necessary that the woman state all physical injuries caused to her and provide documents if possible such as medical certificates, photographs of injuries, X-rays and statements of people who have seen her being assaulted.

Exemption for Criminal Offences

Criminal cases filed for offences committed between husband and wife will be tried by the regular Criminal Courts. If the husband assaults the wife or makes dowry demands, the Family Court will not try the matter. In

general, all offences under the Indian Penal Code and any other Penal Law such as the Dowry Prohibition Act will be tried by the Criminal Courts.

Procedure

The Family Courts Act has made changes in procedure only. Parties would still be governed by their Personal Law. If a Hindu wants a divorce, he or she will have to file the case in the Family Courts (where there is one). The case will be tried under the Hindu Marriage Acts.

Objectives

A Family Court is supposed to provide a more informal forum for settling disputes between spouses. The court, that is, the judges, are required to first try and bring about a reconciliation between the parties and settle the dispute amicably. The judges routinely refer the parties for marriage counseling. This does not mean that divorce or judicial separation is not available. The judge will grant the divorce or any other matrimonial relief sought for when reconciliation fails.

Greater Powers to Family Courts

The regular civil courts have limited powers to deal with property disputes between husband and wife. Among Hindus, S. 27 of the Hindu Marriage Act, 1956 allows the judge to pass orders in respect of jointly owned property presented to the parties at or about the time of marriage. So if any one of the parties to a Hindu marriage wants to recover property which has been acquired in a single name, some time after the marriage, the claim for the property cannot be made in the matrimonial proceedings, in ordinary civil courts.

The Family Courts have greater power regarding disputes between spouses. The Family Courts can deal with property disputes between husband and wife: 1) When the property is owned by either of them. 2) When the property belongs only to the husband. 3) When the property belongs only to the wife.

Injunctions in Custody and Maintenance Cases

The Family Court can grant injunctions preventing the removal of minor children from the custody of one parent and preventing the husband from selling or transferring property when claims of maintenance are made on him. The time of acquiring the property is not important. If the matrimonial home is likely to be sold by the husband, the wife can ask for an injunction to prevent such a sale.

Lawyers Kept Out

A husband or wife or both cannot, by right, have a lawyer to represent them in the Family Court. If there are complicated questions of law involved in the case, the judge may allow one or both parties to be represented by a lawyer. Presently, in Bombay, parties consult a lawyer for preparing the case, doing the paper work and also for training them about what to say in the court. The filing procedures are still very technical. If the case is complicated and the need for legal assistance is felt, an application must be made to the court for permission to have a lawyer. If the husband has applied for a lawyer, the wife should also apply for one.

Filing A Civil Complaint

When a person wants to file matrimonial proceedings, divorce, judicial separation or restitution of conjugal rights, the steps to be taken are:

1) File a petition of plaint. A lawyer's help is usually required to do this. The petition must contain full names and addresses of both parties, the names of the court and the subject-matter of the petition. The person filing the petition is known as the Petitioner. The opposite party is called the Respondent.

2) The fact on which the complaint is based must be stated. For example, if the petition is for divorce on grounds of cruelty and adultery, the specific acts of cruelty with dates of occurrence must be stated. The facts leading to presumption of adultery as well as the name of the third party must be given. If the name of the third party cannot be found out in spite of making efforts, or if the husband goes to prostitutes, the third party or Co-respondent's name need not be given.

3) All the reliefs claimed from the court such as maintenance *pendente lite*, permanent alimony, child custody, or injunctions must be stated. The judge will not grant reliefs which are not claimed.

Claim of Maintenance

The Applicant (or Petitioner) that is, the person claiming maintenance, must show that her income is inadequate for her support and that the Respondent has sufficient income to support her. Details of the husband's income from all sources including bank accounts, stocks and securities, life insurance and other policies should be stated. It helps to state whether the man has cars, expensive electrical gadgets and immovable property so that the judge can determine a fair amount. The items on which monthly expenses are incurred as well as those of the children (when necessary) should also be given.

Claim for Custody

The name and the ages of the children whose custody is claimed and the reasons for the claim must be given. If it is apprehended that the children may be forcibly removed from the custody of the Petitioner an injunction must be sought preventing the Respondent from taking away the children.

Reply to the Petition

After the petition is filed in court, the court issues a summons to the Respondent to answer the petition within a certain period. This "summons" has to be served through a bailiff of the court. A person who can identify the Respondent must accompany the bailiff. If the Respondent does not wish to answer the petition he may not show up in court. The judge may then on that date or later pass a decree after taking evidence of the Petitioner.

When the Respondent wishes to oppose the petition he will file a "written statement" denying all the charges. He may also make a counter claim for custody, maintenance etc. The petition may be dismissed if the Respondent proves that the charges against him are baseless. If the husband has filed the petition for divorce or any other matrimonial proceeding, the wife can make an application for custody, maintenance, injunctions or return of property.

Settling Disputes

It is not necessary that a bitter battle be fought. If the parties can amicably settle the matters pertaining to maintenance, child custody and other disputes, the agreement can be filed in court and the judge will pass an order in terms of the agreement. If there is no agreement between parties, the judge will hear both sides and the parties will also have to prove the charges. The judge will then make a decision. The judge may give less than claimed. Also because of the workload and pending cases in courts it may take a long time to get a judgement. However, interim orders are easier to get and temporary injunctions are granted in the very beginning, especially in cases of severe physical cruelty.

Enforcing the Decree

After the Respondent has been served with a copy of the decree or interim order, he may fail to pay maintenance, or hand over custody of the child or may violate injunctions.

If the husband is employed, his salary or part of it can be attached by an attachment order of the court. Any movable or immovable properties, or bank accounts can also be attached or sealed for default of payments.

An application for attachment of the husband's property must be made to the court giving details of the property and the amounts which have not been paid or are in default. The court will then issue an order directing that the husband's property be taken charge of by the court, which is called an attachment order. Property which is attached can then be sold through the court and the money received will be given to the wife. The person who fails to pay can also be sent to civil prison for civil contempt after getting a suitable order from the court. Imprisonment can be also ordered for violations of injunctions and other court orders.

The court has inherent powers to pass any orders to meet the interests of justice. For example, if a husband has filed for divorce and fails to pay the Respondent wife maintenance claimed by her, the judge may stop or stay the husband's petition until he pays up.

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Flavia Agnes

Family Courts: From The Frying Pan Into The Fire?

In 1975, the committee on the status of women recommended that all matters concerning the "family" should be dealt with separately. Accordingly, provision for special proceedings in family matters was included in the Code of Civil Procedure by an amendment in 1976. The family was broadly defined to include brothers, sisters, ancestors and lineal descendants. But nothing further was done in this respect till the issue of Family Courts was raised by the women's movement during the early eighties.

The women's movement raised demands for reforms in laws concerning women. In response to this, the rape law was amended in 1983; the Dowry Prohibition Act was amended in 1984 and again in 1986; cruelty and harassment to wives was made a cognisable offence under S. 498(A) IPC in 1983 and a special section to deal with dowry deaths was included in the IPC (S. 304B) in 1986. The Family Courts Act which was passed in 1984 was part of the same trend of legal reforms concerning women.

The women's movement, which had raised these demands, focussed attention on the unequal power relationship between men and women at every level and the anti-women bias within the law and in court. A demand was made for laws and procedures which would ensure women's economic rights within marriage and make divorce proceedings speedy, less expensive, less traumatic and more just for women.

What was required was matrimonial laws and courts somewhat along the lines of labour laws and Labour Courts, which recognise the unequal power balance between labour and management. Special statutes and procedures have been enacted so that the balance is tilted in favour of labour. According to legal experts O.P. and K.R. Malhotra, the law

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governing industrial relations is an attempt to mitigate the disequilibrium inherent in employment relations — moulding contract through legislation. The main object of industrial adjudication is to be a countervailing force to counteract the inequalities of bargaining power which are inherent in the employment relationship. This is achieved by extension of existing agreements or by making new ones or in general, the *creation of new obligations or modification of old ones*. The aim of industrial adjudications was to be free from the *subconscious pressures of preconceived notions and the tyranny of dogmas* to adopt a realistic, rational and pragmatic approach.

Laws and procedures were needed in matrimonial matters which would apply similar principles in order "to mitigate disequilibrium inherent in marriage relationships by creating new obligations or modifying old ones". The aim of the Family Courts ought to have been "to be free from subconscious pressures of preconceived notions and the tyranny of dogmas and to adopt a realistic, rational and pragmatic approach".

The Family Courts Act — Pro-Family and Anti-Women

Since the demand for a uniform, secular and non-sexist code was not conceded, the Family Courts Act was seen as a positive step, at least where procedural law is concerned; because only half the problems women face are located in substantive laws. The other half are located in procedural laws — the hostile and intimidating atmosphere within courts, endless delays, strict technicalities and the sexist and anti-women interpretations of laws by judges.

But the Family Courts Act was not aimed at tilting the balance in favour of women. Instead, the Act was committed to preserving the institution of marriage. This was a regressive approach, as by now it is a historically well established fact that the institution of marriage can be preserved only at the cost of women — by denying women property rights and the right to divorce.

In fact, all recent laws which are considered to be progressive and pro-women have been anti-family. For instance, the Dissolution of Muslim Marriages Act, 1939 and the Hindu Marriage Act, 1955, which gave Hindu and Muslim women the right to divorce, the Hindu Adoption and Maintenance Act, 1956 which recognised the right of Hindu women to reside separately and yet be maintained by their husbands, the amendment in the Hindu Marriage Act in 1976 which included the provision of mutual consent divorce, can all be viewed in a traditional sense as being "anti-family". The next logical step was to move further in the same direction by making this right of divorce a practical and feasible reality rather than a

nightmare by ensuring that divorce proceedings are speedy, devoid of anti-women bias and economically more fair and just to women.

The judiciary and court officials have to be carefully selected or alternatively oriented towards achieving this end. The object has to be gender justice. But instead the Act stipulated that persons committed to the need to protect and preserve the institution of marriage, should be appointed as judges. Ironically, by this very definition, women activists and lawyers whose sustained campaign for legal reforms had in the first place raised the demand for Family Courts, would be disqualified from being appointed as judges or counsellors in the Family Courts, by the very nature of their activities, which can be labelled as "feminist" and hence "anti-family".

The Act also makes a presumption that children's welfare lies within the "family", with both the parents living under one roof. Anyone who has any grassroots experience of working on women's issues will realise that this is a baseless presumption. In a broken marriage it is far better for the children who are daily exposed to verbal abuse, physical battering, humiliation and degradation of their mother to be brought up by a single parent in spite of the lowering of their economic standards. Many a times it is the children who advise their parents to separate rather than stay on in a bad marriage. But the woman is often advised to stay on in a bad marriage only because society does not offer any alternatives. Instead of creating an environment where women can live in dignity with their children by strictly enforcing women's economic rights, by allowing women and children the use of the matrimonial home even after divorce and generally creating the social space by making houses and jobs available to single mothers, in the interest and well-being of their children, the Act just presumes that the institution of marriage should be preserved in the interest and well-being of the children.

Unfortunately, women's groups at this juncture did not raise a strong objection to the Act and were under the illusion that the actual functioning of the courts would work in favour of women.

The Act also did not define "family". Matters of serious economic consequence which affect the family, like testamentary matters are not within the purview of the Family Courts. What is within the purview of Family Courts are matters concerning women and children — divorce, maintenance, adoption etc, -- issues which the courts were supposed to deal with on an emotional plane rather than on a legal one. Also, the Act is indifferent to issues concerning minority marriages (Parsi and Christian) which are within the jurisdiction of the High Courts. No statement has been made whether the jurisdiction will continue with the High Court or will

Rajkumari Motwani's Struggle

Rajkumari Motwani, a graduate and a trained teacher belonging to the upper middle class, has been married to Ashok Motwani for more than 10 years. They have a 6 year old daughter, Vijaya. Right through her married life Rajkumari had been repeatedly sent home to bring more and more gifts for the husband and his family. The family would resort to all kinds of violence and harassment, which have resulted in four different cases under S. 498 IPC against Ashok and his family members. No amount of pressure, even from the Sindhi community, could influence the Motwanis to be good to Rajkumari.

So much so, that in July 1988 they drugged her and drove her to Jabalpur and left her there with her parents. Ashok meanwhile married another girl from Nagpur.

Rajkumari tried to go back to her matrimonial home in Raipur several times, but each time she was beaten up and she and her daughter thrown out. She was even forced to sit on a dharna and in a chain hunger strike outside her house along with her 6 year old daughter and the Chattisgarh Mahila Jagruti Sangathan (CMJS).

At one time the Motwanis left home on their own and filed false cases under Ss. 145 and 146 Cr.P.C. against members of the Sangathan. Though S. 146A was cancelled, notices for section 145 Cr.P.C. have been served.

Despite beatings and humiliations Rajkumari has entered the house and is still living there.

During the whole struggle of Rajkumari from December 1989 to March 1990, while on the one hand we approached all possible avenues — the Raipur

now be transferred to the Family Court.

The Act also brought civil and criminal jurisdiction under one roof. This was seen as a positive measure which would centralise all litigation concerning women. But the maintenance under chapter IX of the Cr.P.C. had served a specific purpose. Since there are Magistrates' Courts in every area, a woman could file an application at a place close to her residence. Secondly, the very nature of Criminal Courts facilitated quicker disposal of applications to a Civil Court. Thirdly, there was a seriousness and a sense of intimidation which is associated with a Criminal Court, which would act in a woman's favour. Also the Act brought under one roof, matters which were handled by forty odd magistrates and at least two courts in the City Civil Court, into five court rooms in the city of Bombay.

Alternative Provided

While the Act laid down the broad guidelines it was left to the State Government to frame the rules of procedure. But the State Governments

administration and police officials to seek their support for a peaceful settlement of the case -- on the other, we tried to raise the issue of Rajkumari in a larger perspective of a) the growing violence on women in their families, b) the dowry system which is the cause of much suffering to women, c) the rights of a wife and child in her matrimonial home.

The response of the government officials, the D.I.G., the commissioner and collector, was ambiguous. While personally, they would appreciate and praise the efforts of the Sangathan in the struggle, they would offer very routine suggestions of going to the court for justice.

They could not respond to Rajkumari's need for a home, when confronted with the situation of Rajkumari sitting by the road outside her home.

Ashok Motwani had violated not only social norms and practices but also the laws of the land, but still there was no way the administration could pin him down. Instead, they all advised Rajkumari to go to the court.

It is worth mentioning here that Rajkumari had appealed to the court in Jabalpur for maintenance for herself and daughter in 1988, but till date, the case has not even come up for hearing. How is a woman to maintain herself?

Meanwhile, the Motwanis resorted to seeking the help of anti-social elements to intimidate us and the neighbours, who had openly opposed them. These people even confronted Rajkumari and threatened her if she complained any further.

Shashi Sail, Chattisgarh Mahila Jagruti Sangathan (CMJS)

failed miserably to create an alternative. Most State Governments did not bother to frame the Rules and set up Family Courts. Rajasthan and Karnataka were the first two states to set up Family Courts. But soon women litigants as well as activists were disillusioned with the functioning of the courts. The situation has become even worse for women within the Family Courts. The discussion here is limited to the situation in Maharashtra and more specifically, Bombay. But the overall situation is the same everywhere, with minor differences. For instance, in Karnataka the tenure of the judges is fixed for five years so in the absence of a judge selected specially for his commitment to safeguard women's rights some feel that they are saddled with an anti-woman judge with no hopes of his transfer in the near future. In contrast, in Tamil Nadu, the marriage counsellors keep changing every 3 months and each time the woman meets a new counsellor she has to explain her problems all over again, with no continuity in the discussion.

The Maharashtra Family Courts Rules framed in 1987 deal elaborately

with the function and role of marriage counsellors in Family Courts. In fact, 27 out of the 37 sections deal with this aspect. Wide powers have been given to the marriage counsellors — i.e. to make home visits, to ascertain the standard of living of the spouses and the relationship with children, to seek information from the employer etc. While a rare and sensitive marriage counsellor can and may use this power in the interests of women, more often than not, these powers are used against the woman — in the interest of the family — since the primary commitment of the marriage counsellor is to "preserving the institution".

Further, and even more strange, after all the elaborate provisions in the Rules regarding marriage counsellors, their report is not even binding on the judges. The report of the marriage counsellor is kept confidential and they cannot be cross-examined.

The marriage counsellors state that their duty is only to ascertain whether reconciliation is possible. While the marriage counsellors might make a useful intervention during the initial stage of conflict, where the marriage has broken down irretrievably this would only delay the proceedings for enforcement of economic and other rights of women and children.

After the preliminary meeting with the marriage counsellor, the case would proceed as per the rules of the Code of Civil Procedure. Thus ironically, those litigants who are expected to present their case in person, and are not expected to have any expert knowledge, face the maximum procedural problems. While the Rules laid down by the State Government (in Maharashtra) have dealt elaborately with irrelevant issues, no attention is paid to creating alternative rules of procedure. This has resulted in total chaos in the functioning of the Family Courts. The Rules did not simplify procedures but have merely reproduced the Code of Civil Procedure with the minor addition that parties should be present in person. While lawyers are excluded from representing their clients, litigants can ask legal advice at any stage of the proceedings. Even simple things like service on advocates on behalf of their clients is not changed but an additional provision, that it can also be served on the parties concerned has been added on.

To give one example of the haphazard way in which Rules are framed, what was earlier referred to as "Notice of Motion" or "Chamber Summons" or "Civil Applications", are today called "interim applications". But the Rule does not provide a format for the interim application. Many lawyers still use the format which is provided in the code which uses words like "counsel can be heard by counsel for the Petitioner" etc. although these seem absurd in a context in which lawyers are not allowed to represent clients.

Absence of Lawyers

It is a myth that the Act does away with the need for lawyers. The family counsellors themselves state that litigants are exploited by lawyers who charge exorbitant fees just to give legal advice and to do simple drafting of the petition. All technicalities of a Civil Court are strictly followed by the Family Courts. So long as the substantive law (in this case the Personal Laws based on religion which are diverse, complex and confusing) and the technicalities of the Code of Civil Procedure are strictly followed, the need for lawyers cannot be eliminated.

The Civil Procedure Code lays down the procedure which ought to be and can be followed in court, which is meant for lawyers to understand and follow. For a lay person who is not familiar with legal jargon, it is extremely difficult to follow this code. The Act and the Rules exclude representation by lawyers, without creating any alternate and simplified Rules. Merely stating that the proceedings are conciliatory and not adversarial, does not actually make them so. The situation has worsened, because in the absence of lawyers, litigants are left to the mercy of court clerks and peons to help them follow the complicated Rules. Women are not even aware of the consequences of the suggestions made by court officials. For instance, when a woman files for divorce and maintenance, the husbands turn around and press for reconciliation only to avoid paying maintenance. It is crucial to the woman that people who are mediating are aware of these strategies. But if a judge or a counsellor feels that a woman should go back to the husband only because he is making the offer and as a wife it is her duty to obey him, it will be detrimental to the woman's interests. Reconciliation can be brought about only by persons committed to protecting women's rights.

Substantive Rights Lacking

In addition to procedural lacunae, older problems connected with substantive law persist. Family Courts have been set up to deal with problems which arise on the breakdown of a marriage — divorce, restitution of conjugal rights, claims for alimony and maintenance and custody of children. The setting up of Family Courts does not in any way alter the substantive law relating to marriage.

Marriage by itself does not confer any rights on women except the right to live in the matrimonial home during the subsistence of the marriage and the right to be maintained. Divorce disentitles a woman to the matrimonial home. Whether or not she gets maintenance during a separation or after divorce, will depend on her ability to prove her husband's means. In a situation in which women are often unaware of their husband's business

dealings and sources of income, it is difficult if not impossible to prove his income. To make matters worse, the existence of a parallel black economy makes it impossible to identify the legal source of income.

In such a situation, unless the law changes in radical ways conferring rights on women and creating new rights in their favour, the setting up of Family Courts will not help alter their position. The right to community of matrimonial property would be the first step in ensuring security for women. This would mean that all property acquired after the marriage, and any assets used jointly, such as the matrimonial home will belong equally to the husband and wife. Based on such a law, Family Courts would be able to provide effective relief to women on the breakdown of a marriage. Even otherwise, courts must be empowered by law, to transfer the assets or income of a husband to his wife and children and to create a trust to protect the future of the children of a broken marriage. As the law stands today, courts have no power to create obligations binding on the husband for the benefit of the wife or children. The other much neglected area of law for women is domestic violence. Wife beating is prevalent in all classes and yet there is no effective law to prevent it or protect a woman against a violent husband.

With these substantive changes, Family Courts will be empowered to protect women, but without them, these courts have ended by being poor substitutes, for Civil Courts.

The adversarial system is unsuited to the needs of women who are in any case disadvantaged and have no access to information relating to the husband's assets and income. Family Courts must have investigative powers so that they can compel disclosures of income and assets to pass orders of maintenance. Such procedures have not been introduced in the Act, once again making the Act meaningless. There is an over emphasis on criminal redress. Little or no thinking has gone into evolving effective civil remedies. The Family Courts Act does not explicitly empower the court to grant injunctions preventing violence or ouster of violent husbands. As a result the Act has ended up being an ineffective instrument to give justice to women.

Actual Functioning: Traumatic to Women

The haphazard way in which the courts were set up is a reflection on the attitude of the state towards women's issues. It reconfirms the fact that most legal reforms have been carried out only as a token measure to appease the women's groups without any real concern for women.

The courts were set up almost overnight, without any preparation whatsoever. The rumour within legal circles is that the courts (in Bombay)

were hurriedly set up to facilitate the promotion of a judge to the High Court. Irrespective of whether the rumour has a grain of truth or otherwise, the fact remains that the courts were set up without even making provisions for stationery and paper, which fact was confirmed by one ex-principal judge of the Family Court during a recent seminar.

The total lack of infrastructure and basic facilities make the fight for justice a herculean task. While both men and women are affected, in any given situation women who do not have any exposure to and experience in dealing with public institutions are the worst sufferers. Conditioned as they are to remain within the four walls of the home, women find it extremely difficult to follow procedures and to explain their problems to a male judge while constantly being intimidated by their angry husbands. The women also become victims of the general anti-women bias in society which is reflected in the attitude of judges, court clerks or peons who treat the women litigants with extreme contempt, while the men experience a certain camaraderie (the brotherhood of men!) with the judge, the clerks or the peons depending upon which social strata they belong to. With this background, the wife of a rich industrialist who asks for Rs 10,000 per month maintenance from her husband is seen as a fighting mongrel by the judge, whose sympathies lie with the "poor, harassed man". The bailiff who has to serve urgent orders on the husbands restraining them from beating the wife, demand as much as Rs 200 from a lower middle class woman, a situation unheard of even in the City Civil Court in the earlier days.

This is the only court where litigants have to sign their name and are strictly screened before entering. A court which is committed to justice for women ought to have been the most open forum. Instead the court treats women litigants as criminals. Some activists feel that the Family Courts have ghettoised crucial economic issues concerning women.

It is also surprising how a court committed to simplification of rules, follows the Court Fee Act to the letter. For instance, when applications were filed in the City Civil Court, the court fee stamp was only Rs 37.50. In the Family Court there seems to be a greater zeal to follow the Court Fee Act and each additional relief requires additional court fee stamps. For instance, Rs 18.75 is charged if custody of children is claimed and Rs 30 if an injunction is prayed. Some judges have recommended that court fees should be abolished altogether in the Family Court. Since the Act and more specifically the state, is committed to preserving the institution of marriage, it should not seek to enhance its revenue through divorce litigation.

Contrast the situation with the Labour Courts where court fees are abolished and procedures are simplified, where the court clerks are friendly and helpful and the atmosphere is informal rather than intimidating.

Family Courts: Expectations and Reality

S.P. Sathe makes some suggestions towards ensuring that Family Court judges are more considerate to the needs of family litigation.

Family Courts are one of the latest models of tribunalisation, designed as an alternative to the court system. Tribunals are considered preferable where: (a) dispute settlement is required to be informed by policy; (b) adjudication has to be flexible so as to be able to employ conciliatory, inquisitorial procedures in addition to or even as an alternative to the adversarial procedures used in courts; (c) problem resolution has to be quick, less expensive and less technical. The Family Court ought to include all the three objectives.

However, the way these courts have been set up and their judges appointed, one doubts how far the laudable objectives of the court can be achieved. A tribunal like this requires judges who are not only experts in law but who have good sociological knowledge about the family system, the plight of women in society and a commitment to the policy of gender justice. The Family Courts Act puts the commitment wrongly by saying that in order to qualify for judgeship of the court, one must be committed to the need to protect and preserve the institution of marriage and family life. If commitment to the institution of marriage is seriously applied as a test for eligibility of a judge, a widower or a divorcee or a bachelor might not qualify for judgeship of the Family Court. What about a person who is a bachelor or a spinster by conviction?

Secondly, the Act states that in the appointment of the judges of the Family court, preference shall be given to women. In practice what has happened is that postings to Family Courts have been considered as promotional avenues for judges in the existing cadres of the subordinate judiciary. Once it is treated as a promotional avenue, appointments are bound to be made on the basis of seniority. In Bombay, in the short duration of the last less than one year, two chief judges of the Family Court were elevated to the High Court. So their tenure on the Family Court was brief — a mere waiting period for their elevation. The same thing has happened in Pune. Judges come to the Family Court either to mark time till their appointment as district judges or to take advantage of the extended period of retirement on the Family Court, again to mark time till their possible

In the absence of basic infrastructure like a stamp office, typist and stationery, services of a notary or even adequate sitting arrangements, canteen and drinking water, the litigants are subjected to endless hardships.

The court is seen more as a court doling out maintenance orders which cannot be enforced, rather than a court deciding crucial legal and economic issues concerning women. The provisions that women judges should be appointed and that the judges should have expertise and experience in settling family disputes, have remained only on paper. The Family Court in Bombay does not have a single woman judge. Also, the judges appointed

elevation to the High Court. The result is that the Family Court does not get a cadre of judges who due to their sustained work in the Family Court, could gain special insights into the problems of matrimonial jurisprudence and develop an expertise in dealing with those disputes from a non-legalistic/sociological perspective.

Furthermore, the time has come to consider whether the Family Court could not consist of a Bench of judges having a combination of law and sociology streams. Both the income-tax appellate tribunal and the administrative tribunals are doing well because they allow an interaction of law with other relevant experience. Should Family Courts not be so composed? It could certainly have one judicial member and another person with rich experience in the field of women's organisations, or family counselling or an eminent sociologist/ academic/lawyer.

Although lawyers have been prohibited from appearing before the Family Court, in practice, courts have been most indulgent in allowing their appearance. This really works more disadvantageously. In ordinary courts, at least parties have a choice of lawyers and so there is competition for providing such services. Before the Family Courts there is a likelihood that only some lawyers having good relations with the presiding judges might gain a monopoly. Expeditious disposal of matters without prohibiting lawyers is possible if there are good judges on the Family Court. If judges use their power of laying down procedures for regulating time to be taken for arguments, or for disallowing irrelevant and long-winded cross-examinations, and for requiring written briefs by advocates, we would have the benefit of lawyering without its minus factors. The Family Courts must make bold innovations in procedures. The procedures must show a clear departure from the adversarial process. Judges will have to follow inquisitorial methods of obtaining information. A different type of lawyering would be required for this. A cadre of socially active lawyers and sensitive judges could make Family Courts a meaningful and efficient forum of matrimonial disputes settlement.

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to the Family Court do not seem to have any special experience or expertise in dealing with family matters, nor any special expertise in settling disputes through conciliation, a requirement prescribed in the Act. In fact, the experience of the Family Court in Bombay during its brief tenure of 10 months, indicates that the post of principal judge is a stepping stone and a stop gap arrangement for an elevation to the High Court.

The Acts and Rules provide for legal experts to be appointed as *amicus curiae* and also a panel of experts in various fields to help the courts to arrive at settlements. The Act also provides for legal aid services for the

economically weaker section of litigants. All these positive suggestions have remained only on paper. The Rules provide for tape recorders to be used while recording evidence which could be used at the appeal stage. But this proposal would be too far-fetched for the Family Courts which did not even have adequate provisions for paper and stationery to begin with!

While not denying the fact that Family Courts are the felt need of the day, merely instituting such courts haphazardly, in a perfunctory manner, will not in any way further the spirit of such courts. While some of the problems are the teething problems of any new institution, others are more inherently built into the Act and the Rules. Unless they are corrected at this juncture, the Family Courts will be a hindrance rather than an aid to a woman's fight for justice.

Appendix 1

Recommendations of the Lawyers Collective Workshop

On 4-5 August 1990, the Lawyers Collective held a workshop on the working of the Family Courts in Bombay and other places in the country, attended by lawyers, litigants and social activist. The following were the recommendations made by the workshop, at the end of the two day deliberations:

1) At present the aims and objects as stated in the Family Courts Act are to preserve the institution of marriage. The Act further states that to select a person to be appointed as a Family Court judge, every endeavour should be made to ensure that "the person is committed to the need to protect and preserve the institution of marriage..." This should be abandoned. This seminar feels that the emphasis on preservation of the institution of marriage for its own sake is misplaced and that there should be a clear policy declaration in the Act that it is intended to promote gender justice. Similarly, the criteria for appointment of judges should be to select persons who are committed to promote gender justice.

2) The tenure of judges of Family Courts in Bombay has been very brief. Appointment as a judge of the Family Court is found to be seen as a stop gap arrangement, a stepping stone for promotion as a High Court judge. This is not conducive to the development of a body of jurisprudence which advances gender justice. This seminar recommends that rules should be framed for appointment of judges for the Family Courts with the intention that the judge of the Family Court should have a minimum tenure of 5 years to enable the development of jurisprudence which advances justice for women.

3) The seminar recommends that each court should consist of 2 members, one with legal background and another from the field of sociology or from a women's organisation or with a history and background of social work. This will enable judgements to be made which are not based on technicalities of the law alone but which reflect awareness of the existing unequal situation in which women are placed.

4) Having regard to the fact that the proceedings before the Family Court are not and must not be adversarial in nature, the Civil Procedure Code ought not to apply without modifications. This seminar feels that there is a need to work out a model procedure code which will apply to proceedings before the Family Court so as to ensure that there is a just determination of the dispute through an investigative fact finding procedure.

5) This seminar recommends that information centres be set up for all Family Courts to explain the procedure and participation of Family Courts to all potential litigants. The seminar further recommends and calls upon the respective State Governments to undertake legal literacy programmes and issue pamphlets in regional languages regarding basic information relating to Family Courts and information regarding how to go about filing a case.

6) This conference recommends that standard proforma be worked out and published in all regional languages setting out contents of a petition which require to be filed in court. The proforma should be simplified, requiring the parties to state only facts without substantiating each fact with evidence.

7) This seminar recommends that the Family Courts should have their own investigative machinery for the purpose of investigating and collecting information which is not readily accessible to women, to file claims in court for maintenance or alimony or any other matrimonial relief.

8) This seminar further recommends that special cells of the police should be located within Family Courts, to facilitate the prevention of violence against women and enforcement of orders passed by Family Courts.

9) All women who wish to file proceedings in the Family Court and who want legal aid should be provided legal aid. For this purpose legal aid committees must be set up within Family Courts.

10) Women are required to make repeated attendance in court. Their travel expenses should be met from legal aid funds until a woman is granted interim maintenance.

11) This seminar regrets to note that Family Courts are not equipped with sufficient infrastructure, such as stationery, court fee stamps, typing facilities, canteen, rest room and recommends that immediate arrangements be made for providing such facilities.

12) This seminar takes note of the fact that procedure for service through bailiff is cumbersome and results in undue delay of proceedings. This seminar recommends that service of summons should be permissible through registered post.

13) This seminar notes with regret that in the Family Court at Bombay there is no access to the administrative branch of the court. Women are made to wait for hours to get information regarding court proceedings. This is because the proceedings are held in camera and court clerks are busy in courts during working hours. Even to obtain minimum information such as the date of hearing, a woman has to wait a whole day till the court clerk is

free from court work. This seminar, therefore, calls upon the State Government to ensure that immediate steps are taken to set up an open administration with access to litigants, which will provide immediate information regarding dates of hearing, courts in which cases are being heard and the stage at which the proceedings are.

14) This seminar recommends that a time limit be set up by the Rules for disposal of a case, including interim applications and final hearing.

15) This seminar recommends that the court work on a shift basis. This is because many working women have to approach the courts and since their personal attendance is required and since lawyers cannot appear as a matter of right, they are compelled to lose their earnings for they have to attend court during working hours. Recognising that there is often need for urgent relief, particularly in cases of domestic violence, the seminar recommends that Family Courts function during the afternoons and on Sundays.

16) The seminar recommends that so far as cases for maintenance under S. 125 are concerned, a state fund should be set up for payment of maintenance. As soon as the court orders payment of maintenance, women must be paid maintenance out of the above fund. Thereafter it will be the duty and responsibility of the state thorough the Family Courts, to recover maintenance ordered from the husband or a person responsible for paying maintenance, and reimburse the fund. This recommendation is being made in view of S. 125 of Cr.P.C. to prevent destitution.

17) Often the real problem for women begins at the recovery stage. This seminar feels that she should be relieved of the unfair burden and the state should make arrangements to make recovery and reimburse the funds.

18) The seminar feels that there is undue insistence on rehabilitation. This seminar strongly feels that any reconciliation can only be worked out within the framework of women's dignity and equal rights. The settlements if arrived at should be comprehensive and within that framework. All rights should be settled including resolution of all disputes relating to family assets whether movable or immovable, including fixed deposits, share certificates, bank accounts, provident fund, right to reside in the matrimonial home, custody of children, children's future rights over their father's property. The Family Courts must have powers to redistribute the family assets, including to sell assets of the husband and the father and create trusts in favour of the wife or the children.

19) Meetings with marriage counsellors should be optional and not mandatory. Marriage counsellors while recommending settlements must be aware of women's rights under the law, so as to facilitate settlements

within the framework of equal rights. Marriage counsellors must be required to have at least a minimum amount of knowledge of the existing law. Under no circumstances must reconciliation be advised if a woman expresses her intention against reconciliation. In cases where there has been a repeated history of physical violence or where the husband has committed bigamy or adultery, women should not be compelled to attempt reconciliation. Where reconciliation has been already attempted by other organisations like women's organisations, community organisations, or legal aid committees, the court should dispense with attempting for reconciliation and should accept a certificate issued by any of these groups that reconciliation has been attempted and failed. This would minimise delays at the stage of reconciliation.

20) State Governments must ensure that adequate funds are available to set up Family Courts on a priority basis. Family Courts should be set up not only in each district but also at block levels, so that women do not have to travel long distances to reach the courts. Family Courts should be given jurisdiction to determine matrimonial disputes in the Parsi and Christian community which disputes are presently decided by the High Court.

21) There should be regular meetings between judges of the Family Court, women's groups and counsellors to ensure collective dialogue and for the purpose of constantly reviewing procedures to facilitate the justice delivery system.

Appendix 2

Guidelines for Filing a Petition in the Family Court at Bombay

Lawyers are not permitted to appear as of right in Family Courts. A woman wishing to file a petition whether for divorce, judicial separation, restitution of conjugal rights or maintenance, may consult a lawyer to help her draft the petition. She can also draft and file her own petition if she wishes to. These guidelines are intended to help a woman draft and file her own petition. They will also help her to collect information required to be given to the lawyer for drafting a petition. For the sake of concrete example, the procedure of the Family Courts at Bombay has been referred to.

1. The title of the petition should contain the following information: Name (also the maiden surname of the woman), age, domicile and occupation of the parties.

2. The first paragraph should contain the following information:

Religion of the parties, domicile at the time of marriage, place and date of marriage, type of marriage ceremony and under which Personal Law the marriage was performed, names and ages of children, domicile of the parties at the time of filing the petition.

3. The marriage certificate should be attached. If marriage certificate is not available, photographs or wedding invitation should be attached. If no proof of marriage is available, then permission to file the petition without proof of marriage should be specifically asked.

4. Facts should be listed in chronological order. As far as possible mention dates and specific incidents. Each new date and fact should start in a new paragraph. All paragraphs should be numbered.

5. After stating all facts it is necessary to set out the facts showing that the Family Court has the jurisdiction to entertain the petition. A petition can be filed in a court within whose territorial jurisdiction the marriage took place or the parties last resided together. Please state this in your petition and state that the court therefore has jurisdiction.

6. Then state that you have paid court fees. Next state that no other petition has been filed for the same or similar reliefs. Annexe a list of documents that you rely on.

7. Specific prayers should be listed at the end of the petition, e.g. state whether you want divorce, custody of children, maintenance, injunction etc. Prayers for interim relief and ad-interim (urgent — without notice to the other side) should be listed separately, after the main prayers.

8. Before you file for custody of the children it is advisable to have the physical custody first and then file for interim custody. The attitude of judges usually is to give interim custody to the parent who actually has physical custody of the child at the time of filing the petition.

9. While claiming maintenance please list out not only the husband's income but all his assets, style of living, gadgets in the house, and also joint property which is in the name of his father/brother etc.

10. It would be better to have the break-up of your expenses, expenses for children (monthly as well as recurring expenses) and also your own earnings, if any, and state clearly the reason for claiming maintenance.

11. All interim reliefs and ad-interim reliefs (reliefs while the petition is pending in court) — interim maintenance, custody of children, injunction against harassment should also be specifically asked for in a separate application called the interim application. Interim application should be supported by a detailed affidavit stating the need for interim reliefs. For example, if one wants immediate maintenance, state that one needs the money for oneself and for child support as there is no other or sufficient source of income. Any interim application should be supported by an affidavit.

12. 3 copies (1 green + 2 white) should be submitted at the time of lodging (2 copies if it is a mutual consent divorce). The registration office for filing the petition is on the first floor of the Family Court.

13. For identification, the person should either be accompanied by a lawyer or should carry along a ration card, railway pass or some other document which carries the photograph and the signature of the person.

14. Since the Family Court does not have a court fee stamp office at present, stamps should be carried along at the time of filing the petition. The court fee stamps are available at the nearby Magistrate's Court. The stamps which are required are as follows:

a)	Petition	Rs 37.50
b)	Interim Application	Rs 2.50
c)	Affidavit	Rs 1.00
d)	Process fee — if Respondent lives:	
	within Bombay	Rs 2.50
	out of Bombay	Rs 5.00
e)	Custody of children	Rs 18.75
f)	Injunction	Rs 30.00
g)	Application for maintenance	Rs 1.00

15. On the day of filing a lodging number will be given and you will be called after 15 days.

16. After 15 days you will be given the petition number, the court room number and the first date of hearing. The Respondent (opposite party) has to be served with the copy of the petition at least 3 weeks before the first date of hearing.

17. If you need to get urgent orders (ad-interim reliefs) you will have to request the clerk to number the petition immediately and assign it to a court for urgent orders. The judge concerned will hear you either on the same day or on the next day, and pass an order. A copy of this order has to be served on the Respondent through the bailiff. This is only a temporary order. You will be given a date after about a week or fortnight. On this date the judge will hear both the parties and either confirm the same order or pass a final order.

18. You have to see the court clerk in the assigned court room for the issuance of the Writ of Summons which has to be forwarded to the bailiff assigned to that particular court and make an appointment with him to accompany him to serve the summons and petition on the Respondent. Someone who knows the Respondent will have to accompany him to identify the Respondent.

19. If both the parties are present on the first date, the parties will be directed to see the marriage counsellor.

20. The marriage counsellor will meet the parties either on the same day or make an appointment to see both the parties together and separately. The parties will have to meet the marriage counsellor before the second date of hearing.

21. After ascertaining from the parties whether reconciliation is possible, the marriage counsellor will submit a report to the judge. The report will not be shown to you. If there is any possibility of a reconciliation the marriage counsellor may choose to have more meetings with the parties either together or separately.

22. On receipt of the report from the marriage counsellor, regarding reconciliation, the case will proceed in court for interim reliefs either on the second date or on the next subsequent date. It is essential that both the parties are present in court. If not the case will be adjourned to another date.

23. When maintenance is deposited in the court, a certificate with a photograph to identify the person to be notarised either by a notary or S.E.M. (Special Executive Magistrate) should be submitted along with an application to the accounts department. The certificate and the application

should carry the short title of the case (name and number of court, petition number, names of Petitioner and Respondent). There are no notaries or lawyers available in the Family Court for this purpose. The best way is to get the formalities completed at the nearby Magistrate's Court and submit the same in the Family Court.

24. When a petition for divorce by mutual consent is filed there is no need to issue a Writ of Summons. The meeting with the marriage counsellor is also a mere formality, only to ascertain that there is no fraud or coercion involved. After this meeting the next date will be given after six months when evidence will be recorded and the decree passed.

25. The decree department is on the 5th floor. An application requesting the certified copy of any order/*roznama* should be addressed to the registrar, decree department. The application should contain the short title, the date of order, the court room number and name of the judge who passed the order. Court fee stamp of 0.65 paise should be affixed on the application. A further fee will be charged for typing and other incidentals. The papers and proceedings are in the concerned court room. You have to ensure from the court clerk that the papers have been sent to the decree department.

26. If you need a lawyer to represent you, you have to make a written application (affix 65 paise stamp) any time during the proceedings. The judge will use his own discretion in allowing you to be represented by a lawyer. But if your husband has been granted permission to be represented by a lawyer then you too have a right to be represented by a lawyer.

27. All applications addressed to the judge should be on green ledger paper. However all of them need not be typed. If an urgent application has to be made, it can be written by hand and submitted to the judge. To save time it is advisable to carry some extra court fee stamps.

29. If your husband hands over any papers to the judge during the hearing you are entitled to a copy of these papers. Please make sure that he gives you a copy. Similarly he is also entitled to a copy of all the papers which you submit to the judge.

(From, *The Lawyers*, September 1990).

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Anand Grover

Jurisdiction of Family Courts — Need for an Amendment

SINCE THE PASSING OF THE FAMILY COURTS ACT, and more so since 1989, there has been considerable confusion in the nature and scope of the jurisdictions of the Family Courts under the Family Courts Act, vis-a-vis High Court's jurisdiction under Letters Patent.

Under an English Act of Parliament passed in 1861, High Courts at Bombay, Calcutta and Madras were set up under Letters Patent, empowering the British Crown to establish such High Courts in Calcutta, Bombay and Madras. By Letters Patent dated 28th December 1865, the High Court at Bombay was established, conferring various jurisdictions to it. Similar Letters Patent were granted for setting up High Courts at Calcutta and Madras.

Clause 12 of the Bombay Letters Patent confers original jurisdiction; clause 17 relates to infants and lunatics; and clause 35 confers matrimonial jurisdiction.

Issue of Jurisdiction

The question that arose was whether, after passing of the Family Courts Act, 1984, the Family Courts set up had exclusive jurisdiction in respect of matters referred to it vide the Explanation to S. 7 of the Act, and whether S. 8 excluded the jurisdiction of the High Court provided under the Letters Patent.

There have been a number of decisions of various High Courts which have considered the matter. In the matter of Patrick Martin (AIR 1989 Mad 231), the Division Bench of the Madras High Court held that the original

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jurisdiction of the High Court in matters of appointment of guardians of a child was lost, after the establishment of the Family Courts Act. It traced the history of clause 17 of the Madras Letters Patent and found that the phrase "according to the order and course observed in that part of Great Britain called England" in the earlier charter of 1882 (clause 16) and the charter of 1800 did not relate to native Indians, but British Europeans.

Following this decision, a single judge of the Bombay High Court in *Kamal V.M. Allaudin v/s. Raja Shaikh* (AIR 1990 Bom 299) inter alia held:

(i) that suits and petitions falling under clause (a) to (f) of Explanation to S. 7 of the Family Courts Act excluding matters governed by the Indian Divorce Act and the Parsi Marriage and Divorce Act, 1936 lie to the Family Court and jurisdiction of the High Court stands excluded in respect of these matters;

(ii) that suits or petitions where matrimonial relief is not sought as contemplated in clauses (a) to (f) of Explanation to S. 7 will continue to lie to the High Court;

(iii) that similarly, suits and petitions where relief of the nature covered by clauses (a) to (f) of Explanation to S. 7 is sought incidentally along with other principal reliefs of a general nature, will continue to lie to the High Court;

(iv) that petitions relating to guardianship falling under clause (g) of the Explanation to S. 7 will lie to the Family Court;

(v) that all suits and petitions falling under Dissolution of Muslim Marriages Act, Muslim Women (Protection of Rights on Divorce) Act 1986 and matrimonial causes relating to Jews lie to the Family Court.

However, no final opinion was expressed as regards matters to which the Indian Divorce Act and the Parsi Marriage and Divorce Acts apply, and which fall within the domain of the High Court.

In *Mary Thomas v/s. K.E. Thomas* (AIR 1990 Mad 100) the Full Bench of the Madras High Court considered the issue and held that the original jurisdiction of the High Court was not ousted and the High Court continued to exercise jurisdiction vested in it by Letters Patent. The decision turned on the interpretation of the expression "District Court" in S. 8 of the Family Courts Act. It held the expression did not include a High Court.

The Division Bench of the Bombay High Court, the Division Bench of the Madras Court in *Kanak Vinod Mehta v/s. Vinod Dulerai Mehta* (AIR 1991 Bom 337), held that the expression "District Court" in S. 8 of the Family Courts Act did not include a High Court, and therefore the jurisdiction of the High Court was not ousted. It observed that jurisdiction

of the High Court could not be lightly taken away, without express provisions.

It is relevant to point out that when jurisdiction was conferred on the Bombay City Civil Court in 1948 and thereby taking away part of the jurisdiction of the High Court, the Bombay Letters Patent Act was specifically amended to exclude the jurisdiction of the High Court to the extent it was conferred to the City Court. The High Court was obviously impressed with this.

In *Iffet Ahmed Abdullah v/s. Ahmed Abdullah alias Sipin Khosla* (unreported) a single judge of the Bombay High Court, on a reference from the Prothonotary and Senior Master, held that the Family Court had no jurisdiction in respect of matters covered by the Letters Patent.

Therefore the position which emerges is that in respect of matters claiming matrimonial reliefs under the Indian Divorce Act, the Parsi Marriage Act, Dissolution of Muslim Marriages Act lie in the High Court, as do matters relating to custody and maintenance claims of over Rs 50,000 in Bombay. The Family Court has jurisdiction only in respect of other matters covered under the Explanation to S. 7 of the Family Courts Act. The objective of setting up of the Family Courts is thus defeated. What is needed and needed urgently is to make it abundantly clear that the expression "District Court" in the Family Courts Act includes the High Court, as well as amend the Letters Patent in all the states where the same is in force, excluding the jurisdiction of the High Court in matters covered by the Explanation to S. 7 of the Family Courts Act.

(From, *The Lawyers*, February 1995)

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Flavia Agnes

Family Courts and Minority Rights

PARVEEN FILED A PETITION for dissolution of her marriage in the Family Court, Bombay in July 1993. Two months later, she was asked to withdraw the petition and was told that the court had no jurisdiction over her case. She was greatly surprised as just a year ago her neighbour Shameem had been granted divorce by the same court. Charmayne had obtained a decree of judicial separation from the Family Court in Pune. So she advised her friend Joyce who lives in Bombay to file a similar petition. But when Joyce approached the Bombay Family Court, she was informed that since she is a Christian the petition had to be filed only in the High Court. Joyce tried to persuade the clerk by citing examples of her friend in Pune and her cousin in Bangalore, who are also Christians, who had been granted reliefs by the Family Courts there. But the clerk was firm and adamant. Joyce is not able to understand why the doors of the Family Courts are closed to her, only because she is a Christian living in Bombay.

Fatima's situation is worse. She had filed her petition three years ago in the Family Court for divorce. Just as the trial was about to start, she was informed that her case would now be transferred to the High Court. She is afraid that the progress made at snail's pace will all be washed away and she would have to wait for three more years before the case comes up for trial in the High Court.

Pillar to Post, Court to Court

Haseena has yet another tale of woe to narrate. In October 1988 she had filed a case under the Muslim Women's Act in the Magistrate's Court. In August 1990 on an application made by her husband the case was transferred to the Family Court. In January 1991 i.e. after three years of filing the case, the court passed an order. But the husband filed an appeal in the High Court stating that the jurisdiction under the Muslim Women's Act lies with the Magistrate's Court and hence the Family Court did not have jurisdiction to pass the order.

During the proceedings, Haseena's advocate pointed out that the husband had himself initially applied for the case to he transferred to the Family Court, so he should not be allowed to get the benefits of any legal ambiguity. The High Court refuted this charge and held that only one factor is responsible for his inconsistent stand and that is the uncertainty of law for which no party can be blamed. After quashing the order of the Family Court, the High Court directed the case to be remanded to the Magistrate's Court for fresh trial.

Why are the doors of the Family Courts being closed to women from the minority communities? The Family Courts in Bombay were set up in October, 1989 to provide an informal forum to resolve marital disputes and help women obtain speedy justice in a more congenial atmosphere. The courts were equipped with non-legal aides like the office of the marriage counsellor to help in resolving conflicts and arrive at an amicable settlement. Although the courts have yet to attain perfection, various studies indicate that the Family Courts in Bombay are functioning far more satisfactorily than any other court dealing with matrimonial disputes in the country. But suddenly minority women are realising that they are being denied the benefits of this new and informal forum for resolving their marital disputes.

Three factors have contributed to this process: the callous and indifferent attitude of legislators to the special situation of minority women, the extremely complex system of courts prevailing in the country and the attitude of the higher judiciary which has preferred to resort to the letter rather than the spirit of the Family Courts Act.

Ambiguous Legislation

The Family Courts Act (FCA) which was enacted in 1984 failed to clarify whether it ousted the original jurisdiction of the High Courts over matrimonial matters. Section 7 of the Act states that the courts shall have and exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court. The ambiguity has arisen regarding the word District Court and this brings us to the second contributory factor to the complex and confusing system of courts.

The High Courts of Calcutta, Bombay and Madras were set up in 1862 under the Charter Act of 1853 and the Indian High Courts Act of 1861. Under the Letters Patent issued under the Great Seal of the United Kingdom, these courts were entrusted with both original and appellate jurisdiction in the presidency areas of Bombay, Madras and Calcutta. Since they had original jurisdiction they functioned as District Courts for the areas. Later, the City Civil Courts which came into existence in August,

1948 became the courts of original jurisdiction. But the matrimonial jurisdiction was retained by the High Court.

The Matrimonial Acts which were enacted subsequent to the setting up of the City Civil Court granted jurisdiction in even matrimonial matters to the City Civil Court by express provisions. Thus the Special Marriage Act of 1954 under S. 2(e) clearly stated: "District Court" means, "in any area for which there is a City Civil Court, that court..." A similar provision was also made under S. 2(b) of the Hindu Marriage Act of 1955.

But under the Indian Divorce Act (1869), the Guardians and Wards Act (1898), the Parsi Marriage and Divorce Act (1936), the Dissolution of Muslim Marriages Act (1939) and for matrimonial issues concerning the Jewish community, the jurisdiction continued to be with the High Court.

When the Family Courts Act transferred the jurisdiction of the 'District Court' to the Family Court, the legislation did not expressly transfer the matrimonial jurisdiction of the High Court to the Family Court. This gave rise to a lot of confusion and the High Courts in their appellate jurisdiction were called upon to clarify the issue. While the initial single bench judgements reflected a spirit of social reform, the later judgements preferred a narrow and technical interpretation relying more upon the letter rather than the spirit of the Act.

Intervention of the High Court

The First Bombay High Court decision on this issue was a single bench judgement in *Kamal V.M. Allaudin v/s. Raja Shaikh* by Justice M.G. Choudhari on 7th March 1990. Addressing the ambiguity regarding the word "District Court" the judgement held: "Even assuming that the High Court may not be described as the District Court, it can certainly be held that it was exercising the same powers and same jurisdiction of the District Court if one were to exist in the city of Bombay prior to the establishment of the City Civil Court.

"Undoubtedly, High Court is the superior court and its jurisdiction cannot be lightly tinkered with. However, times have changed. New dimensions of public interest and social reform are emerging, taking us in the direction of fulfillment of the obligations arising under chapter IV of the Constitution of India. The High Court cannot be over sensitive and feel touchy over loss of its jurisdiction to entertain kinds of suits which cannot in any manner come in conflict with its position as the superior court and a court of appeal."

This judgement relied upon a judgement of the Madras High Court in Patrick Martin's case in the year 1989 which had held that the ordinary civil

jurisdiction of a general nature of the High Court is analogous with the jurisdiction of the District Court. Hence the word "District Court" would include the High Court in its original jurisdiction.

But the subsequent Division Bench judgement of the Bombay High Court in *Kanak Vinod Mehta v/s. Vinod Dulerai Mehta* overruled the judgement of the single bench and held that matters under the Guardians & Wards Act, the Indian Divorce Act and the Parsi Marriage & Divorce Act rested solely with the High Court.

But the Family Courts continued to entertain petitions under the Dissolution of Muslim Marriages Act, 1939. But a recent judgement of Justice Dhanuka delivered on 20th August 1993 held that the Family Court has no jurisdiction to entertain disputes under the dissolution of Muslim Marriages Act.

While this is the position under matrimonial laws, the laws on maintenance contributed further to the confusion. The jurisdiction over maintenance under S. 125 Cr.P.C. was shifted from the Magistrate's Court to the Family Court by the Family Courts Act of 1984. But the Muslim Women's (Protection of Rights on Divorce) Act enacted in 1986 (which provided alternate reliefs to divorced Muslim women) did not take cognizance of this change in procedural law. The ambiguity regarding jurisdiction provided additional loopholes to the husband to deny and delay justice to women as can be observed from Haseena's case mentioned above. After setting up of Family Courts, matters which were pending in Magistrate's Court were transferred to the Family Court. After a few months it was felt that the Family Court has no jurisdiction over matters under the new act and the cases were transferred back to the Magistrate's Courts.

Untold Misery for Women

The narrow and technical interpretations of the High Courts have aggravated the harm done to Muslim women by statutory provisions. The present legal position regarding rights of Muslim women is as follows: If she is deserted and wants to claim maintenance she has to approach the Family Court under S. 125 Cr.P.C. If she also wants divorce she has to file a petition in the High Court under the Dissolution of Muslim Marriages Act. But under this Act she can neither claim maintenance nor custody of children or even access to them. When she finally obtains a divorce, or is divorced during the pendency of her case by her husband through the provision of "triple *talaq*" she has to file yet another petition in the Magistrate's Court under the Muslim Women's Act to claim her *Mehr* and fair and reasonable provision and maintenance.

The haphazard way in which legislations are framed and passed has created untold misery for women of the minority communities as their diversities and complexities are seldom kept in view. There is a tendency among our legislators to interpret the term "women" as synonymous with "Hindu women". And by this interpretation, all progressive legislations, be they substantive or procedural, have bypassed women from minority communities.

The complexities arising out of the issue of original jurisdiction of the High Court are specific to Bombay and Madras (Calcutta does not yet have a Family Court). In all other places, the District Court is the court of original jurisdiction and the High Courts are entrusted only with appellate jurisdiction. Hence bringing uniformity in these cities ought not to pose any ideological opposition. But there seems to be a great reluctance on the part of the bar as well as the bench in the higher echelons of the judiciary to expand the jurisdiction of the Family Courts. There is a general feeling that the decisions of the Family Court are passed in a haphazard manner, which has given rise to an increase in appeals and multiple litigation.

Even if there is a grain of truth in such allegations, the remedy does not lie in constraining the jurisdiction of the Family Courts. While accepting as *fait accompli* the substandard functioning of Family Courts, circumventing the problem by excluding large sections from its jurisdiction would defeat the very purpose of the Family Courts.

(From, *The Lawyers*, May 1994).

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Sanober Keshwaar

The Shariat Court Controversy

MUSLIM WOMEN across the country supported by progressive elements within their community and without, have risen like never before against the un-Islamic and unjust practice of the triple *talaq*. So it was not without reason that these reform seekers were expecting the All India Muslim Personal Law Board to outlaw the triple *talaq* at its eleventh session held at Ramgarh near Jaipur on October 10, 1993. They were to be sorely disappointed.

Far from outlawing the triple *talaq*, the Board, in its wisdom, took a decision to establish Islamic Courts in all the states and set up mobile Islamic Courts for the rural areas! To appease the women demanding reform, the Board announced the setting up of womens' cells which would educate Muslim women about their rights and privileges under Islamic Law. The Board appealed to all Muslims to refer their family disputes to these proposed Islamic Courts and to abide by their decisions.

Regressive Step

These announcements caused considerable furore within and without the community. The national media interpreted these decisions to mean that the Board was intent on setting up a parallel judicial system and subverting the Indian Constitution. The reformists amongst the Muslims were aggrieved that the Board in its shortsightedness was playing straight into the hands of the Sangh Parliament, strengthening the hands of illiterate bigots who would only use it as one more weapon to deride Muslims for being unpatriotic. So furious was the uproar following the decision, that within five days of the first announcement, the President of the Board, Maulana Ali Mian Nadvi clarified at a hurriedly called press conference that the term "Islamic Courts" is in fact a misnomer. What had been suggested at the Jaipur convention was that religious arbitration committees termed as Dar-ul-Qaza should be established in those parts of the

country "where they do not already exist." Such institutions have been in existence since the beginning of this century in Bihar, Bengal and Orissa, and the Board claims that they have done away with the need of costly and time-consuming legal battles in court by effecting an amicable settlement of disputes.

The Board has been at pains to stress that they by no means wish to set up a system of "parallel courts" and that the Dar-ul-Qaza were in no way antagonistic to the laws of the land. The Board argues that these Dar-ul-Qaza committees will be beneficial to the people for several reasons: they will reduce the pressure on the normal courts, they will be assisted by people who are fully conversant with Islamic jurisprudence while there are very few Civil Court lawyers who are similarly qualified, and the poorer sections will save much money and time which they would otherwise have to spend on lawyers and litigation by having their family disputes speedily settled in the Dar-ul-Qaza. Maulana Nadvi has clarified further: "I want to make it clear that these Dar-ul-Qaza Committees are not authorised to award any sort of punishment to anyone. Their verdict will in no way be binding and the parties concerned will have full freedom to approach Civil Courts if they are not satisfied by such out of court settlements."

The Shàriat Act

It needs to be pointed out here that it was the British who, by enacting the Muslim Personal Law (Shariat) Application Act, 1937 created the basis for Muslims to have their own courts to settle certain types of disputes. To quote its S. 2: "Notwithstanding any customs or usage to the contrary, in all questions (save as relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula* and *mubaraat,* maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law." This act, however, is silent on how this law has to be implemented, as to the nature of courts, their jurisdiction, etc.

Some of the Board members have preferred to call the courts they envisage as "Shariat Panchayats" — "Shariat", because they concern themselves only with conflicts which come within the preview of the Muslim Personal Law; and "Panchayat", because they operate on the panchayat principle of community intervention to resolve individual disputes. Professor Tahir Mahmood, the internationally renowned scholar

of Muslim Law and currently dean of the faculty of Law at Delhi University, claims that "extra-judicial settlement of disputes is recognised as valid and legal under the Indian Arbitration Act, 1940 and the government has been encouraging it through Lok Adalats."

Dr Mahmood points out that the "Dar-ul-Qaza" type of extra-judicial bodies are not peculiar to Islamic jurisprudence, but similar bodies exist among other communities. For example, the Parsi Marriage and Divorce Act, 1936 has established the Parsi Matrimonial Courts for the Zoroastrian community and their decisions are accorded validity by Civil Courts. Similarly, S. 29(2) of the Hindu Marriage Act, 1955 recognises the dissolution of marriage of a Hindu couple effected through a custom or by a panchayat as absolutely valid.

Dr Mahmood has also indicated a major advantage the Dar-ul-Qaza have over the Civil Courts. The Qazi under the Shariat is empowered to choose and apply any school of Islamic Law to a case before him if the circumstances so demand and the ends of justice are met. The Civil Court judge, on the other hand, is not entitled to apply any other law other than the one based on the Hanafi school to a case where both the litigants are Muslims.

But are the Dar-ul-Qaza in a position to enforce the orders they may pass in a matter before them? Only community pressure and the fear of Allah can coerce litigants in these courts to implement the verdict. However, in the relatively smaller, highly organised business communities like the Khojas and the Bohras the verdicts passed by their arbitration councils are effectively implemented because the husband's survival in social life and in business depends on the community.

The Board's Track Record

Progressive Muslims all over the country have, however expressed their displeasure at the Muslim Personal Law Board's proposal to set up more Dar-ul-Qaza. It seems that the Board has not been able to acquire a typewriter or a telephone of its own in the 22 years of its existence and therefore there is reasonable doubt whether it will actually be able to set up a national network of the Dar-ul-Qaza. Some years ago, as a part of the Board's fervent campaign in support of the Muslim Women's (Protection of Rights on Divorce) Act, it had vociferously promised to set up rehabilitation centres for divorced women who, under the new Act, were deprived of maintenance by their husbands beyond the iddat period of three months. Not a single such centre has been set up till today. Further, it was in the power of the Board to remove the anti-women and un-Islamic provisions of the existing Muslim Personal Law, like the practice of triple *talaq* and

the prohibition against Muslim women in the matter of inheriting agricultural land. But the Board is a hidebound, patriarchal body which boasts no liberals and cannot be expected to make any progressive reforms. The Board, further, is an unelected body and cannot promote itself as the sole representative of Indian Muslims.

Need of the Hour

Then where can the Muslim women and the progressive Muslims turn to for reform of the law? Not certainly to the Hindutva bigots who are vehemently offering the solution of the Uniform Civil Code. In today's communally ravaged atmosphere, the imposition of a Uniform Civil Code on an already alienated and deeply bruised community will be an invitation to communal violence and bloodshed.

What is needed is a massive social, reform movement within the Muslim community for the reform and codification of their law within a definite time frame, among other things. Only the progressive, democratic Muslims liberals can lead this struggle and it will undoubtedly be supported by the secular and democratic people of all other communities. Given the powerful position of the orthodox and fundamentalist mullas and Maulvis who are backed by vote-seeking politicians of every hue, the struggle for reform will be a hard and long drawn out one, but it will surely raise the democratic consciousness of the Muslim masses. It is towards this goal that secular liberals of all communities must direct their energies.

(From, *The Lawyers*, November 1993).

Part Seven

Reforms

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The Lawyers' Collective

Overdue Amendments

Section 125 Cr.P.C.

1. Section 125 of the Code of Criminal Procedure provides a cheap and expeditious remedy to women who have been neglected by their husbands for claiming maintenance. It is, however, unfortunate that this section contains an upper limit of the amount which a magistrate is permitted to award as maintenance, viz. Rs 500.

This upper limit, in these days of inflation, has made a mockery of the provision. Often a magistrate who knows that the upper limit is Rs 500 will give an order for much less. Under the said section a magistrate is empowered to make an order for monthly allowance. This means hardship to the women and the magistrate should be empowered to order payment of lump sum in advance as he may deem fit. Under the said section the magistrate is not empowered to order that the amount be deducted from the husband's salary at source and paid directly to the wife. We suggest that such an enabling provision should be made. Accordingly we recommend the following:

a) Section 125 be amended by the State of Maharashtra so as to remove the upper limit of Rs 500 payable as monthly allowance;

b) The magistrate be empowered to order payment of lump sum;

c) The magistrate be empowered to order direct deduction of awarded amount from the salary of the husband by the employer at source;

d) The following categories of women who have the right to maintenance should also be added in S. 125: (i) cohabitants, which expression includes a woman living with a man as a wife though not married to the man; (ii) a second wife, whether such marriage is illegal or void; (iii) a widowed daughter-in-law.

e) An Explanation should be added to S. 125 stating that the words

"unable to maintain herself" relate only to the woman's annual separate income and not to the possibility or potentiality of her earning;

f) An Explanation should be added to S. 125(1) that rates of monthly allowance means income not only for food, shelter, clothing and education of children, but also any sum that may be needed to be set apart to meet emergencies on account of expenses or sickness, physical disability or for any other reason;

g) Section 125 should be amended so that the order of maintenance is payable from the date of application and not from the date of the order;

h) The first proviso to S. 125(3) disabling a wife from recovering maintenance on the expiry of one year of the order should be deleted.

i) Proviso (2) to subsection (3), which states that the offer of a person against whom an order for maintenance has been made to maintain his wife on condition she lives with him after the passing of the order, should be deleted;

j) Subsection (4) and subsection (5), depriving a person from claiming maintenance if she is "living in adultery", should be deleted;

k) In determining the amount of maintenance to be granted, the magistrate will take into account not only the income of the person but also his property and other resources, and his interest in joint family property;

l) The magistrate should be empowered to order the person liable to pay maintenance for six months in advance;

m) The appeal against any order of maintenance should not be maintainable unless the amount of maintenance ordered to be paid is first deposited in court;

n) The summons issued by the magistrate shall state that the Respondent shall file the written statement within 7 days and that it shall contain: (a) factual grounds for resisting the prayers, (b) legal grounds for resisting the claim, (c) make a full disclosure of all his income from all sources and all assets and all properties, (d) make self assessment of maintenance payable by him. The maintenance to be paid shall be arrived at by dividing his income into equal shares, one for each of the members of the family, i.e. wife, co-habitant or children. Maintenance so derived shall be deposited in court and will be treated as provisional and will be subject to upward or downward revision by the court. The wife should have a right to withdraw the amount deposited. If the Respondent fails to file a written statement, the court may treat the statement made in the petition as proof and make an order on that basis;

o) Such an order shall be enforceable by the court. If there is wilful

disobedience by the Respondent to pay the awarded amount, the court may order any property of the guilty person to be attached and sold in order to recover the amount and may also detain the person in jail. The order of attachment can be executed through a Civil Court for enforcement in the same manner as in a decree of a Civil Court;

p) An investigating and enforcement machinery should be placed at the disposal of the court to assist the court in any enquiry in an application under S. 125. The investigating officer with the support of the local police or any other state agency shall, if necessary, investigate into the income and resources of the Respondents, his place of employment and his where-abouts and submit a report to the court;

q) The investigating and enforcement machinery should take over the function of serving of the summons on the Respondent. As in the Civil Procedure Code, the law should be amended to provide that if the court officer goes to serve the summons on the Respondent and he is not traceable, the summons can be served on any member of the family who may be available at his address. If after two attempts of service the Respondent is not traceable at his address, then the summons can be pasted on the door of the residence of the Respondent;

r) The above mentioned agency should also carry out the function of enforcement of the order of maintenance as if it were executing a civil decree.

We recommend that the Civil Procedure Code be amended to allow the attachment of provident fund amounts to recover maintenance.

We may mention that the Code of Criminal Procedure can be amended by a state. The amendment will then operate in a state. We may also mention that the Law Commission of India has long back recommended that the above amendments be made in the interests of women.

Exemption From Court Fees

2. One of the biggest inhibiting factors for women to assert their rights against their husbands or their in-laws is the requirement to pay court fees on any suit or petition that may be filed to claim property reliefs. Thus, for example, a women filing a suit under the Hindu Adoption and Maintenance Act for maintenance and separate residence is liable to pay ad-valorem fees. Her claim will be valued at the rate of the amount claimed for one year by way of maintenance. Thus, for example, if she claims Rs 10,000 per month, her claim will be valued at Rs 1,20,000 and she will be liable to pay court fees thereon. Similarly, if she is claiming arrears for maintenance for several years, the amount of court fees to be paid will go up. Similarly, if

she is claiming separate residence on the ground that her husband is cruel to her, she will be liable to pay court fees on the value of the flat that she may be claiming. Women are also liable to pay court fees on their petitions for divorce and several other applications that they file in court. We suggest that the State of Maharashtra amend the Bombay Court Fees Act, 1959 and exempt women from paying court fees on any suit or proceeding that they may take against their husbands or in-laws, for any relief arising out of the matrimonial relationship, whether for divorce, custody, judicial separation, maintenance, arrears of maintenance, charge on the property for maintenance, etc. Similarly, when a father dies leaving sons and daughters and the sons refuse to part with the inheritance to their sisters, the sisters are required to file a suit against the brothers or other paternal relatives to claim their inheritance. On such suits, the sister/s are liable to pay heavy court fees. We suggest that women be given exemption from paying fees on such suits also.

We therefore recommend that provisions of S. 20 which exempt certain documents from being chargeable for any fee be amended to include documents relating to suits or petitions by women. Section 46 empowers the State Government to issue notifications revising or remitting fees in relation to any of the entries in the First or Second Schedule. Several entries in the First or Second Schedule relate to proceedings between husbands and wife — we recommend that a notification be issued under S. 46 exempting women from paying court fees in the First and Second Schedule in relation to any relief claimed by them which is of matrimonial nature or which relates to the inheritance.

Free Legal Assistance

3. Section 304 of the Code of Criminal Procedure states that in any trial before the Court of Sessions where an accused is not represented by a pleader, the court may assign a pleader for his defence. Subsection 3 states that the State Government may by notification direct that the provisions of subsection 3 shall apply to any class of trials before several courts in the state. This means that an accused is entitled to be represented by a lawyer provided by the State Government in the Court of Sessions but not in other courts. The Lawyers Collective has done work on a prison rights project for women undertrials in Arthur Road Jail, Bombay. We have found that several women undertrials have been languishing in jails for want of representation by a lawyer. They have not been able to apply for bail. We, therefore, recommend that the State Government should issue a notification under S. 304 subsection 3 applying provisions of the said section to all Magistrates' Courts. This will mean that on the very first occasion when a

women is produced before a magistrate she will have to be provided with a lawyer who can make an application for bail on her behalf. From our experience we are sure that this will go a long way in alleviating the plight of women undertrials who languish in jails on petty charges, for want of proper legal assistance.

Law Against Domestic Violence

4. Experience has shown that there is no effective remedy against domestic violence. The judges are very reluctant to grant injunctions restraining violent husbands from beating up their wives, or imposing conditions of good behaviour on them, or granting injunctions restraining the violent spouse from entering the matrimonial home. Most countries in the world have passed laws against domestic violence. The Lawyers Collective has provided a model law on domestic violence and we strongly recommend that the State Government take initiative and enact a law against domestic violence.

5. The State of Maharashtra has its own system of legal aid. However, the system is non-statutory and requires the appointing of lawyers on a panel. We strongly recommend that all qualified lawyers with certain minimum experience (possibly 2 years) be authorised to undertake legal aid work. The client should have liberty to approach any lawyer of her choice in her local area with a request for legal aid and assistance. The lawyer she approaches should be asked to fill in a form and forward it to the legal aid department which will sanction grant for the legal aid. This method will ensure that every practicing lawyer in the State of Maharashtra is incorporated within the legal aid framework if he or she so chooses. The rates at which payments are made for legal aid work are abysmally low and cannot provide an incentive to a willing lawyer to provide legal aid. We strongly recommend that these rates be revised upwards.

Jurisdiction of Family Court

6. There have been certain judgements of the High Court of Bombay to the effect that the Family Courts Act does not take away the jurisdiction of the High Court under the Letters Patent in relation to matrimonial cases. This means that suits for matrimonial reliefs, such as maintenance or separate residence and even applications for custody, can still be filed in the High Court. As a result of this judgement, the Family Courts are entertaining petitions for divorce only by Hindus under the Hindu Marriage Act. All other petitions for any other relief and petitions for divorce by Muslims, Parsis and Christians have to be filed in the High Court. These judgements have rendered the Family Court more or less dis-functional.

This issue requires the serious consideration of the law department and the Letters Patent Act will have to be amended so that Family Courts alone have the exclusive jurisdiction to deal with all matrimonial and other custody matters.

Community of Property

7. The Hindu Marriage Act, in its applicability to the State of Maharashtra, should be amended to provide that a woman, on the solemnisation of her marriage, will become a joint owner of the properties and assets of the husband and that, in the event of dissolution of the marriage, the court will be empowered to pass an order partitioning the assets and handing them over to the wife. Similar amendments should be made to the Indian Christian Marriage Act, 1872, Indian Divorce Act, 1869 which applies to Christians to provide that a Christian woman will become joint owner, on solemnisation of the marriage, of the assets of her husband. A similar amendment should be made in the Parsi Marriage and Divorce Act 1936 to ensure that a Parsi woman becomes joint owner of the properties and assets of her husband on marriage. Similarly, the Muslim Women's Rights on Divorce Act should be amended to state that a Muslim woman would be entitled to the property and assets of her husband upon dissolution of the marriage, as the court may deem fit.

8. We also recommend the creation of an institution akin to the Law Commission which will be charged with the duty of constantly reviewing the legislation.

(From, *The Lawyers*, April 1994).

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Recommendations of Lawyers Collective Bangalore Law School

LOOKING SPECIFICALLY at legislation from a gender perspective, the group found not only a distinct sexist bias in the laws and judiciary, but also that women were ignorant about their basic rights. To set this right, specific legislation related to the oppression of women were discussed. These included Personal Laws and the Uniform Civil Code, marriage and divorce, maintenance and custody, bigamy, laws related to violence against women, the legal procedures and employment related laws such as sexual harassment at work.

During the course of the Law School, the group formulated a series of recommendations for amendments to existing legislation which must be opened for public debate. The recommendations with their underlying rationale are listed below under the specific categories discussed.

Personal Laws

At present, all matters regarding marriage, divorce, maintenance and custody of children are decided on the basis of religion. That Personal Laws of most communities discriminate against women, is undeniable. Hence, there is need to make them non-sexist. As a first step to introducing a Uniform Civil Code, the group felt that the sexist and discriminatory provisions of all existing Personal Laws must be reformed.

Marriage

1). In order to avoid problems of proof of marriage and ensure that the binding obligations are encouraged, it was felt that all marriages, irrespective of religion, must be compulsorily registered. 2). The uniform minimum

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Vimochana, a Bangalore based women's organisation and the Lawyers Collective held a three-day Law School for social activists, lawyers and women who have been victims of marital and social harassment, from 21 to 23 May 1988.

age of marriage for both men and women should be 18 in all Personal Laws. 3). Monogamy should be the rule in all Personal Laws.

Rights on Marriage

1). All property acquired after the date of the marriage should be jointly owned by the husband and wife. 2). The wife should have the unconditional right to reside in the matrimonial home. 3). The husband should not be permitted to sell the matrimonial home, without the consent of the wife. 4). If the matrimonial home is tenanted, the husband in whose favour it is tenanted, should not be entitled to surrender the tenancy except in favour of the wife.

Divorce

1). Divorce by mutual consent should be available in all Personal Laws. 2). The husband's right to divorce his wife unilaterally, without recourse to Family Courts, should be abolished in all Personal Laws. 3). Irretrievable breakdown of marriage should be introduced as a ground of divorce in all Personal Laws. However, no divorce demanded by the husband shall be granted on this ground if the wife objects, unless the husband makes adequate economic provision for her. 4). When a woman files a petition for divorce or is being sued for divorce on a request being made by her, the state shall provide adequate shelter for her and her children on a priority basis. 5). If the wife is in possession of the matrimonial home, she shall not be dispossessed at the time of divorce. 6). Divorce granted by the Family Court shall be final and binding and shall not be subject to confirmation of the High Court, as under the Indian Divorce Act. 7). The court granting divorce should have the power to direct lump sum payment of alimony or order a transfer of assets from the husband to the wife, including transfer of the matrimonial home and to make long term settlements by way of trusts in favour of the minor children of the marriage.

Guardianship

The existing basic presumption that the father is the natural guardian of the child should be done away with, because of its inherent sexist bias.

Child Custody

1). In all Personal Laws, the overriding consideration in deciding who should have custody of children should be the welfare of the children. Ordinarily custody shall be given to the parent who has taken responsibility for looking after the child. 2). In deciding what is in the best interest of the child, the lack of earning capacity of the mother or the fact that she has no

dwelling shall not disentitle her to the custody of the children. 3). Working mothers shall not be disentitled to custody on the ground that they are away on work and that there is no other female member in the family. The state shall, therefore, make provisions to support community-run creches for working women. 4). Alcoholism, cruelty (mental or physical), or violence towards the mother or the children, should disentitle the father to custody. 5). The earning parent shall bear the unconditional obligation to maintain the child regardless of who has custody. 6). Ordinarily, children should be spared the trauma of coming to the court. As far as possible, they should be seen in their natural environment, rather than in court.

Maintenance

The law of maintenance requires change not only substantively but also procedurally. Maintenance orders, even when granted, are virtually impossible to enforce.

1). When a wife applies for divorce or for maintenance or for custody of children, the husband should within 7 days of filing of her application, or simultaneously with her application as the case may be, make a full and true disclosure of his assets and income. 2). He should within 7 days thereafter, make a self-assessment of maintenance payable by him and deposit in court an amount equal to three months' maintenance for the woman and children. The amount of maintenance shall be arrived at by dividing his income into equal shares, one for each member of the family (i.e. his wife and children). The maintenance so derived shall be provisional in nature, subject to upward or downward revision by the court with regard to the nature and circumstances of the case. The wife should have the right to withdraw the amount immediately on deposit. 3). While making an order for maintenance, the court should direct that shall be deducted from the husband's salary.

Rights of Cohabitees

The following recommendations were made.

1). When a man and woman cohabit and call themselves as husband and wife, on a breakdown of the relationship, the woman shall have the same rights to maintenance as a lawfully wedded wife. 2). For the purpose of S. 494 of the I.P.C. (bigamy), living together as husband and wife shall be deemed to be a marriage. The woman in an invalid second marriage shall be entitled to maintenance in the same way as a legally wedded wife. We disagree with the recent Supreme Court decision disentitling such women to maintenance [*Bakulbhai v/s. Gangaram*, 1988 (1) SC 537].

Adultery — No Offence

The offence of adultery under S. 497 of the I.P.C. shall be dropped, as it is based on the assumption that a married woman is the property of her husband.

Family Courts

The existing attitude of Family Court judges is "patch up" the marriage at any cost. We have often seen judges advising women who have been battered, to "forget the past and go back to the marriage in the interests of harmony". Such attitudes are against the interests of women and must be condemned. Rather, women struggling to get out of violent situations must be encouraged to separate and become independent. In the circumstances, it was felt that the following recommendations should be made:

1). As soon as an applications for divorce is made, the matter shall immediately be referred to a Marriage Counsellor who shall call a qualified social worker or an activist who has been with a women's organisation for not less than 5 years, to attempt a reconciliation. If at such stage, the woman states that she does not want reconciliation, the Counsellor shall record that the marriage has irretrievably broken down and submit her/his report to the court. If the court finds that the marriage has broken down, the court shall grant a decree of divorce.

2). We believe that Family Courts should function without lawyers. However, so long as the form and content of the law is legalistic, women should be represented by lawyers as of right. As and when the law is amended, to simplify the procedures, lawyers should be barred from representation in the Family Court.

3). Having regard to the fact that the parties are required to remain present in the Court, proceedings should be held in the evenings and on Sundays to facilitate the attendance of working women in court without loss of pay.

4). Family Court judges should be appointed not only from among lawyers, but also from disciplines other than the law. Any person having a degree in Sociology, Psychology, Women's Studies or related subjects should be eligible for appointment as a judge.

Criminal Remedies for Violence Against Women

The conference recommended:

1). Voluntary bodies should evoke attempts to set up Police Monitoring Cells which will deal with police misconduct, assist the victims and liaison

with the police station to ensure that the victim's rights are implemented. 2). Investigations conducted by women's groups should be admissible as evidence in a criminal trial. 3). In cases of abetment to suicide, S. 113 A of the Indian Penal Code shall be amended to make it mandatory (at present it is discretionary) for a judge to draw the presumption that the suicide had been abetted by the husband or his relatives, if the death occurs within 7 years of marriage and cruelty has been proved.

Civil Remedies for Violence Against Women

1). There is an urgent need to introduce a Domestic Violence Act, authorizing courts to grant ouster injunctions against a violent husband, with power of arrest for violating such orders. 2). The court dealing with a complaint of violence should be empowered, in addition to granting an injunction or any other relief, to grant damages against the husband.

Women in Employment

Although there are several issues relating to the employment of women which need to be discussed, such as "equal-pay-for-equal-work", conditions of employment in the unorganised sector, maternity leave etc., the meeting decided to concentrate on some of the little discussed issues such as sexual harassment at work. Many women face such harassment but few talk about it as they are worried about the consequences. Today there is no law which prevents sexual harassment at work. It is a form of discrimination based on sex. The meeting therefore recommends:

All existing labour laws be amended by stating that sexual harassment of women at work shall amount to discrimination against women and be an unfair labour practice.

Courts, Legal Ethics, and Legal Literacy

The members strongly felt that no amount of changes in the law will bring justice to women, so long as they are not implemented. Some of the major reasons for non-implementation or procedural delays were identified as the indifference and callousness of judges and lawyers, the non-availability of free legal aid and the lack of awareness of legal rights. Members said that even in Family Courts they had experienced long delays due to too many adjournments taken at the instance of the lawyers and liberally granted by the courts. Unscrupulous lawyers are charging fees even while working on a legal aid case. Legal fees are exorbitant. It was therefore recommended that:

1). All proceedings in Family Courts be concluded in 6 months. 2). No adjournments be granted at the request of a lawyer. 3). A lawyer remaining

absent on two or more occasions in court, shall be suspended from practice unless he or she shows valid cause of absence. 4). A schedule of legal fees be fixed and published and no lawyer be permitted to overcharge. 5). Lawyers providing legal aid shall be paid at the same rates fixed in the schedule of fees for lawyers. A legal-aid lawyer who charges fees shall forthwith be removed from the rolls of the Bar. 6). Voluntary organisations should be encouraged by suitable grants to conduct legal literacy camps. 7). Legal literacy particularly as it relates to gender justice should be taught in all schools and colleges to sensitize both men and women to the problems of women. 8). There should be periodic reviews of the functioning of all courts and all procedures with the intention of avoiding delays. 9). All courts shall publish half-yearly statistics of pendency of cases, number of cases decided, categories of cases decided and average time taken for disposal of cases.

(From, *The Lawyers*, July 1988)

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Anju Jain

Maharashtra Ushers in a Uniform Adoption Law

ON AUGUST 9, 1995, the Government of Maharashtra passed the Maharashtra Adoption Act, a uniform law on adoption of children. The Act, now awaiting the assent of the President of India, is a first step towards introducing a Uniform Civil Code in the state. Historically, the practice of adoption in India was recognised mainly amongst Hindus. Certain communities amongst Muslims like the Fatimid Bohras and the Parsis (only in the forms of Palukaputra and Dharmaputra) also recognised adoption by custom. However, this practice amongst Muslims and Parsis was rare.

Under modern statutory law, only Hindu Law provided for adoption in the shape of The Hindu Adoption and Maintenance Act, 1956. None of the other Personal Laws, by statute or custom, recognised adoption, thereby making adoption a religious rather than a secular practice. At most, non-Hindu parents could hope to exercise rights of guardianship whereby they would not have full parental rights over the child. So also, non-Hindu children sought to be adopted could not have identical rights as a biological child would automatically be deemed to have, chiefly the right to intestate succession. These drawbacks were responsible for a great deal of hardship and pain experienced by non-Hindu adults, besides depriving thousands of children of homes and security.

The Hindu Adoption and Maintenance Act, 1956

The objective of the custom of adoption under ancient Hindu Law was to perpetuate the line of succession by creating an artificial relationship. Only adoption of sons was recognised by Hindus. There were eight kinds of sons, of which "Dattaka Putra" was the adopted son. The Hindu Adoption and Maintenance Act, 1956, gave statutory recognition to the

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custom of adoption and made an attempt to advance it from a sacramental law to secular law.

Various provisions were introduced under codified law that broadened the scope of adoption amongst Hindus, mainly:

(i) All Hindu women except married women, were allowed to adopt;

(ii) Along with male children, even female children below the age of 15 years could be taken in adoption;

(iii) Illegitimate, orphaned, abandoned children and children whose parentage was not known could be taken in adoption;

(iv) No ceremonies were essential while taking a child in adoption.

However, though the Act was a definite improvement over custom law, it still retained its old notion which acted as a deterrent to one of the main purposes of the Act, namely, to provide parents and a home for the destitute or orphaned/abandoned child and to give the welfare of the child paramount consideration. The basic purpose of adoption as recognised in most countries -- the welfare and upbringing of children -- was given second place to the religious motive. The primary limitations are given below.

A private act: Adoption was essentially a private act and a transfer of dominion over the children by the natural parents to the adoptive parents. No court order was necessary for parents giving in adoption, unless the person giving in adoption was a guardian.

Father's absolute right to give in adoption: In the lifetime of the father, he alone had the right to give in adoption, though the consent of the mother was necessary.

Disability of a married woman to take in adoption: A Hindu married woman could not adopt unless her marriage was dissolved or her husband was dead or had renounced the world or ceased to be a Hindu or was declared to be of unsound mind.

Adoption permitted of one son and one daughter only: If the adoption was of a son, the adoptive father or mother by whom the adoption was made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption. Similarly, if the adoption was of a daughter, the adoptive father or mother by whom the adoption was made must not have a Hindu daughter or son's daughter (whether by blood or by adoption) living at the time of adoption. Thus parents wanting to adopt two children of the same sex could not do so. Further adoption of more than two children was out of question.

Irrevocable: An adoption once made under this Act, was not revocable under any circumstances.

Headway with the MAA

The Maharashtra Adoption Act (MAA) is a departure from all prevalent personal and customary laws, thereby establishing a uniform law which governs all persons irrespective of their religion, caste or sex. The outstanding feature of the MAA is, that it supersedes all existing statutes and customs relating to adoption. No other law, but the law as laid down in the MAA will apply to any person giving, taking or being taken in adoption. All the restrictive provisions of the Hindu Adoption and Maintenance Act, 1956, have been removed and the law substantially revamped. A brief overview of some of the salient features of the MAA will serve to illustrate this.

Section 3: This Act applies to every person adopting a child in the state irrespective of the person's religion, caste, race or sex. In fact, the Act itself claims to be a step towards formulating a Uniform Civil Code. The very fact that all adults can henceforth exercise their right of adoption has brought in its wake, massive relief to all agencies and individuals working for the promotion of adoption.

Section 6: Subject to the provisions of this Act, the District Court may, upon an application made in the prescribed form and manner, by a person for the adoption of a child, make an adoption order in respect of such a child.

Section 7: Any person who has completed the age of twenty-five years and is of sound mind may adopt a child under this Act.

Section 8: Any child who is not already adopted or married may be taken in adoption.

Section 9: (i) An adoption in respect of a child shall not be made:

> (a) in any case, except with the consent of every person who is a parent or guardian of the child; and
>
> (b) where the child is in the care of an institution, except with the consent of the institution given on its behalf by all the persons entrusted with, or in charge of its management.

Section 17: There shall be a licensing authority for grant of license to adoption institutions.

Protection of Adopted Children

In addition to departing from the old law, the MAA has provided for the protection of adopted children, their welfare and interest being of prime consideration.

Section 8(2) of the MAA provides that no adoption order shall be made where the sole applicant for an adoption order is male and the child to be adopted is female, unless the applicant is the biological father of the child or if there are other special circumstances which justify such an order. In the current climate of increasing awareness of sexual abuse of children, this is a prudent provision. However, as "special circumstances" are neither defined nor enumerated, it appears as though a loophole exists. How this is interpreted by the courts will demonstrate its actual application.

Section 12 gives the discretionary power to the District Court to make interim orders in an application for adoption, giving the care and custody of the child to the applicant, for such period as the court thinks fit, by way of a probationary period and on terms which consider the interest and welfare of the child. The same section also grants the power to the court to revoke such interim orders as it may see fit.

Section 16 gives power to the District Court to pass such orders as in its opinion are just and proper, in relation to adopted children who are treated cruelly, discriminated against or being exploited in any manner which is not for the welfare of and in the interest of the child. Here again, the vigilance and perseverance of adoption agencies and other statutory bodies will bear out the practical application of such protection.

Section 23 lays down that, except with the leave of the court, no person can advertise in any form with regard to the giving or taking of a child in adoption. It further imposes a fine of a thousand rupees on any person who knowingly contravenes this provision. As with many of our statutes that impose ridiculously low fines, this too seems a symbolic gesture. A paltry sum of a thousand rupees will be no deterrent to any wrong-doer.

Adoption by Foreigners

Presently, adoption of an Indian child by foreign citizens and persons domiciled outside India is governed by the Guardians and Wards Act, 1890. However, the MAA lays down provisions governing the adoption by persons domiciled outside India. Sections 24 and 25 give the District Court powers to make provisional adoption orders for persons domiciled outside India to take a child in adoption. The MAA however, has regulated this area of adoption by introducing the mandatory acquiring of a certificate from the Central Government before making an application to the court. This enables the authorities to evaluate the *bona fides* of the applicant and to safeguard the interest of the child.

The State of Maharashtra has made a commendable effort to secularise the law relating to adoption and to introduce comprehensive reforms. Considering the wide acclaim that the MAA has received from various

sections of society, other states ought to take the cue from Maharashtra and pass similar statutes. Much is spoken and written of the rights of the child. It is high time the law-makers translated some of that verbiage into action.

(From, *The Lawyers*, September 1995).

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Biraj Tiwari

Marriage Laws to be Revamped

THANKS TO THE LAUDABLE EFFORTS of the National Commission for Women, two Bills seeking to introduce significant changes in marriage laws are under consideration by the Government of India. They are: 1) The Marriage Bill 1994 and 2) The Domestic Violence to Women (Prevention) Bill 1994.

The Marriage Bill 1994 seeks to repeal at one stroke all the existing acts covering marriage and divorce. The Indian Christian Marriage Act, 1872, the Parsi Marriage & Divorce Act, 1936, the Muslim Personal Law (Shariat) Application Act, 1939, the Special Marriage Act, 1954, the Hindu Marriage Act, 1955 and the Muslim Women (Protection of Rights on Divorce) Act.

The idea behind repeal of the above mentioned Acts is to have a uniform law dealing with marriage and dissolution of marriage, since the problems and difficulties faced by married women are common and universal irrespective of caste, religion, and economic status. Further, the confusion that prevails today regarding the basic prerequisites of a legally valid marriage and its consequent status is sought to be removed.

The important changes envisaged are as under:

1. Compulsory registration of marriage. Entry in the marriage register or a marriage certificate, shall be presumptive proof that the marriage has been performed. Conversely, if there is no entry in the marriage register regarding a marriage, it shall be presumed that no such marriage has been performed.

2. Penalties at the rate of Rs 100 per day for delay in forwarding declaration of marriage to the marriage officer beyond the stipulated period and for making a false declaration, and imprisonment extending from three months to seven years for any person who procures the making of false

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entries, for the marriage officer who fails to make entries or knowingly makes false entries or destroys or tampers with the register of marriage.

3. The mandatory period of separation for dissolving marriages by mutual consent is not less than three months.

4. Additional grounds for dissolution of marriage have been introduced, namely:

a) Wilful neglect of Petitioner for a continuous period of one year immediately preceding the presentation of petition.

b) Addiction to intoxicating liquor or stupefying drugs so as to render Petitioner's life miserable.

c) The other party is suffering from AIDS, not having contracted it from the Petitioner.

d) The other party has not been heard of for a period of three years.

Medical Expenses

5. The court will have the power and discretion, at the time of passing of a decree for dissolution, to make an order for residence, maintenance, medical and other necessary expenses of either spouse. For instance, it may direct payment of a periodical or gross sum, or settlement of property with absolute or life interest or direct allotment of the whole or part of the matrimonial home, or of allotment of any other residential accommodation, or payment of a sum towards rent of suitable accommodation.

6. Failure to comply with this order is punishable with imprisonment extending to seven years or with fine, not less than the amount of maintenance due.

7. The Family Court will have jurisdiction to entertain a petition by a wife domiciled and ordinarily residing in India for three years, immediately preceding the petition, where the husband is not a resident of India.

8. The Family Court will also have exclusive jurisdiction to entertain certain criminal cases arising out of offences punishable u/s 493, 495, 496, 497, 498 and 498A of IPC and S. 4 and 4A of Dowry Prohibition Act, S. 5 & 6 of Child Marriage Restraint Act and offences relating to domestic violence.

9. A time schedule will be fixed for the entire proceedings, including judgement, on the date of first appearance of the two parties, which will not be departed from, except for "grave and exceptional reasons". A total maximum time period of six months is envisaged for disposal of both civil and criminal cases arising under the Act.

Domestic Violence

The Domestic Violence to Women (Prevention) Bill 1994 has been overdue for a long time. It proposes to tackle the large-scale common problem of domestic violence and matters incidental to it, faced by many Indian women today and in the past. This is not a problem concerning women only, but a human problem having many social and psychological repercussions on society. That Indian men have got away with violence against women in their homes, largely perpetrated by them or with their tacit approval by others, is solely due to lack of a solid forum available to women to combat this menace.

This Bill seeks to fulfill, at long last this void in the field of women's rights in the following ways:

1. Where the woman herself feels inhibited for some reason to approach the court, for relief against domestic violence, either due to family and social pressures or due to lack of legal aid and advice, e.g. in rural areas, a petition may be presented by any other person on her behalf or by a Protection Officer approved under the Act, for passing of a protection order.

2. The Bill defines "court" in wide terms to include a Family Court and a Mahila Panchayat consisting of three members of a Gram Panchayat.

3. Unnecessary delay in service of notice is avoided by making it returnable in seven days. Where the Respondent is not available for service, the notice is pasted on the main door of the place where he lives and is deemed to be validly served and shall not be called in question in any court.

4. Domestic violence may be committed either by the husband or any of his or her relatives and includes a) wilful conduct which is likely to drive the woman out of the house or to commit suicide or injure herself b) cause injury (mental or physical), c) harassment causing distress, d) any act which compels the woman to have sexual intercourse against her will and e) any act unbecoming of the dignity of the woman.

5. The protection order passed by the court will be valid for four years. It will contain, inter alia, directions to the husband or relatives to desist from committing domestic violence and in all cases direct that the wife live separately along with the children if any, or that the matrimonial home be given to the wife for her separate living, expenses of such separate living be borne by the husband or relative. Where the woman is unmarried or a widow or divorcee or has been deserted, separate accommodation be provided to her and her children, if any.

6. Necessary amendments will be required to be made in the Indian

Penal Code and the Code of Criminal Procedure. A S. 498B will have to be introduced viz. husband or relative of husband or of the woman subjecting her to domestic violence and punishment for the same to be entered in chapter XX-A of Criminal Procedure Code.

National Commission

The Bills are the brainchild of the National Commission for Women and the Expert Committee set up to aid the Commission in drafting the Bill, consisting of eminent legal personalities such as Retired Justice O. Chinappa Reddy, Professor B. Shivaramiah and Mr S. Ramiah retired law secretary, Government of India.

Although both the Bills are practically and legally on a very sound footing, there may be some practical difficulties in giving effect to them. For example, in urban areas such as Bombay, Calcutta, Madras and Delhi where joint families live together in small flats, it would be impractical and impossible to provide the wife with her own separate accommodation within the matrimonial home or even to find suitable affordable rental accommodation.

Secondly, since a complete repeal of all present statutes governing marriage and divorce is required, there could arise initially some amount of communal resentment to the idea of one Indian Marriage Act for all communities, or for all Indians. The Law Ministry and the Ministry of Home Affairs will therefore take their own time to consider the Bills and give their clearance before presenting them to parliament.

Nevertheless, Mrs Padma Seth, former member of the Commission, feels that as with any new idea, there is always an initial resentment and scepticism which eventually dies down, so also with these Bills. According to her, the Marriage Bill will be subject only to the overall law of the land, i.e. the Constitution of India.

A marriage certificate, she says, is as important as a birth certificate and a death certificate. She has no doubt that its beneficial impact will percolate to the rural women too with the setting up of Gram Panchayats and subsequently Mahila Panchayats. Although there are today about 50 Family Courts all over India, we need at least 800 Family Courts spread proportionately over the country.

Silent Victims

According to Mrs Seth, the minority Personal Laws and even the Hindu Marriage Laws are more often than not retrograde in nature and of little help to thousands of women who are silent victims of invasions on their mental

and physical dignity. Although the Indian Penal Code makes assault and causing hurt an offence, there are hardly any instances of women approaching the court for relief, against their husbands or relatives. The Domestic Violence Bill to that extent deals with this problem head-on.

It is hoped now that the bureaucrats in the Ministry of Law and Ministry of Home Affairs, and thereafter the Members of Parliament give the Bills their due importance in making them full-fledged Acts of Parliament. It will then be left to the administrators of justice to give effect to the good work initiated by the Commission.

(From, *The Lawyers*, May 1995)

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Heera Nawaz

Equal Property Rights for Women in Karnataka

When the Hindu Succession Act, 1956 was enacted, it was believed to be a legal landmark as it was the first act to provide a comprehensive and uniform system of inheritance among Hindus. Prior to this, the Hindu Women's Rights to Property Act, 1937 was in operation and though this enactment was itself radical as it conferred new rights of succession among Hindu women, it also gave rise to lacunas which were later filled by the Hindu Succession Act which came into force on 17 June 1956. It was the first post independence enactment of property rights among Hindus — unique, as it applied to adherents of both the Mitakshara and the Dayabhaga systems, as also to persons in certain parts of South India previously governed by certain matriarchal systems of Hindu Law such as the Marumakkatayam, Aliyasantana and Nambudri systems.

Important Changes

The Hindu Succession Act, 1956 brought about several important changes in the existing laws on property. For example, S. 6 of the Act makes an important change in the rules of a Mitakshara coparcenary — if a member of a Mitakshara coparcenary dies, the property devolves upon his widow by testamentary or intestate succession, as the case may be, and not by survivorship. This rule confers on the widow an equal right with the male member of the coparcenary.

Secondly, prior to the passing of this Act, the Mitakshara school recognised three classes of heirs and the Dayabhaga school recognised another three classes of heirs. This was struck down by classifying the prospective heirs into four categories, viz. (a) heirs of class 1 (b) heirs of class 2 (c) agnates (d) cognates.

Thirdly, prior to the Hindu Succession Act, succession to *Streedhan*

(women's property) depended upon whether a woman was married or not, and if married, according to the form of marriage. All these distinctions were ironed out by S. 15 of the Act, which lays down a uniform scheme of succession to the property of a female Hindu who dies intestate. In short, the Act has made the mode of succession lucid and clear and several doubts cast by conflicting decisions of the Privy Council and the various High Courts were eliminated.

Welcome Proposal

While the Hindu Succession Act may be said to have revolutionised the previously held concepts on rules of inheritance, it has its own flaws while dealing with property rights of women. It is indeed good news that the Hindu Succession (Karnataka Amendment) Bill, 1987 has been proposed and seeks to remedy these in its application to the State of Karnataka. This Amendment Bill is characteristic of an age which is one of great ideals, fast changing theories and equal rights for both men and women.

Against the backdrop of Articles 14 and 15 of the Constitution, the fundamental rights proclaiming that there should be no discrimination on account of sex, this to-be-passed Bill proclaims that exclusion of the daughter from participation in coparcenary ownership merely due to her sex, is unjust and discriminatory. The Bill therefore proposes that in a joint Hindu family governed by Mitakshara Law, the daughter of a coparcenar shall by birth become a coparcenar in her own right and be entitled to the same rights in the coparcenary property as she would have if she had been a son, inclusive of the right to claim by survivorship and to enforce a partition. Also, on partition of coparcenary property between the members of a joint Hindu family, the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son.

In addition, "when the coparcenary property includes a dwelling house, the rights of a daughter to claim partition of the dwelling house shall not arise until the male coparcenars choose to divide their respective shares and the daughter shall be entitled to a right of residence therein". This sub-clause in its present form where a daughter has to wait till the male members seek a partition, is unjust and arbitrary. One of the main incidents of ownership by women is the right to claim partition of dwelling houses. If the above section (in quotes) of the Amendment Bill is allowed to be passed as it is, then the absolute rights proposed to be granted to women, are made negatory and illusory.

Another significant section of this Amendment Bill, is that when a Hindu woman dies after the commencement of this Act, then her interest in the Mitakshara coparcenary property shall devolve by survivorship upon

the surviving members of the coparcenary and not in accordance with the other provisions of this Act. If, when the Hindu woman dies, she has left a child, then the interest of the deceased Hindu woman shall devolve by testamentary succession and not by survivorship.

Immovable Property

If immovable property devolves upon two or more heirs and any one of such heirs proposes to transfer his/her interest in the property, then the other coparcenars shall have a preferential right to acquire the interest proposed to be transferred. However, the difficulty in its implementation is due to the fact that the immovable property may be located at different sites which are bound by different property laws. For example, in Karnataka where a daughter is held to be a coparcenary along with the son, and in Maharashtra where a daughter has no coparcenary right. In such an eventuality, perhaps it would be advisable for the coparcenary right in favour of the daughter to be forthwith incorporated in the principal enactment, namely, the Hindu Succession Act, 1956.

The Hindu Succession (Karnataka Amendment) Act, further says that if there are two or more coparcenars proposing to acquire any interest, then the coparcenar who offers the highest consideration for the transfer shall be preferred. However, if property is allotted on the basis of "the highest bidder wins", women will definitely face discrimination as the majority of women particularly rural women are just housewives and not economically independent, whereas the majority of men are educated and employed. Therefore, the circumstances being such, this Amendment Bill should give the female coparcenar the first offer and only after her refusal should the offer be made to other male coparcenars.

(From, *The Lawyers*, July 1988).

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Sanober Keshwaar

"Scream Silently, or the Neighbours Will Hear"

"It is an unpalatable, and as yet insufficiently appreciated fact, that much, if not most, of the violence in society takes place within a family setting."

John Ekelaar
Family Law and Social Policy

NO ONE REALLY WANTS TO TALK about violence in the home. For individuals, admitting to it would seem like admitting to a failure of their relationship, and of themselves. For society, it would mean facing the unpleasant fact that what is considered to be one of its most precious institutions is also one of its most dangerous. Far from being a haven of safety and security, the family can be a "cradle of violence", and much of this violence is directed against the female members; in particular against the wife by her husband. For a man, beating his wife is a private privilege of marriage, a way to unload himself of all the anger and frustrations of daily life, without fear of reprisal. For a woman, battery by her husband is regarded almost like a concomitant of marriage, something as routine and inevitable as doing the housework, bearing children, etc.

Women continue in violent relationships for myriad reasons, the most crucial being the fact that they are economically dependent on their husbands to support them and their children. They lack the education and training to get jobs and attain economic independence. Most have often witnessed their mothers and sisters being beaten and believe that it is a way of life. Battered women often feel that it is their fault, that they must have provoked the beating in some way.

Women are conditioned from birth to believe that they are inferior to men. And they accept battery from their husbands as their fate. There are,

of course, other victims of domestic violence. Young girls are victims of sexual assault within the family, and to a lesser extent, young boys. Elderly family members, particularly women, are vulnerable to assaults by their grown-up children, as are sick and infirm family members. Nonetheless, most of such violence is directed at the wife, whether by the husband or by his agents like the mother-in-law, and this violence is perpetrated on her in her role as wife.

The statistics available in this regard are alarming. In the US, 40 per cent of female murder victims are killed by family members or boyfriends. Every 15 seconds a man batters a woman in her home. 50 per cent of women are subjected to some form of domestic abuse in their lifetime. In England and Wales, a study conducted in 1974 (not an untypical year) showed that 47 per cent of the murders and manslaughters committed were within a family setting, 23 per cent involved a spouse or co-habitant.

In India, as in all countries the world over, the situation is no different. The astronomical number of wife-murders, more popularly known as "dowry deaths", that occur every year are an enduring cause for national shame. The widely prevalent practice of aborting female foetuses continues today, despite the enactment of laws making such acts illegal. In some areas the murder of female infants is also common. But wife-beating is perhaps the most prevalent form of violence against women. Reliable statistics regarding this are not available in India as yet, as research into wife abuse is relatively recent and current estimates of the actual level of wife battery are culled from reported incidents to the police only. These statistics therefore present only the tip of the iceberg. Battered women are only too often reluctant to report that they have been beaten up, because of guilt, shame and loyalty. They fear that they may lose the economic support of their husbands or harm their careers. Also, battered women do not report their problems to the police because they usually get a negative response. Domestic violence is thus the most prevalent, and yet the least reported crime in society.

Rule of the Thumb

Legal and cultural traditions the world over historically granted men permission to beat their wives, and even kill them in certain circumstances. Blackstone in his "Commentaries on the Laws of England" (1775) stated that the husband was empowered to correct his wife "in the same moderation that a man is allowed to correct his apprentice or children". Blackstone's codification "limited" a man's right to chastise his wife with a stick no thicker in circumference than his thumb, and this right came to be known in popular parlance as the "rule of the thumb". Husbands were also given

the right to sexually abuse their wives and could prosecute anyone who committed adultery with or seduced their wives, though no action could be brought against a husband who forced his wife to have sexual intercourse against her will.

In India, the wife's position was no different as the code of Manu decreed that she be considered of no more importance than a chattel of the husband. A wife was regarded as subordinate to and the property of her husband with no autonomous existence. She could not own, inherit or deal with property, she could not sue, she had no legal status apart from her husband. Wife battery was treated as a private privilege of marriage which did not warrant any state interference. The law till today presumes that the man has total sexual rights over his wife: hence it is unwilling to consider marital rape as a crime, unless the spouses are legally separated under a decree of judicial separation. Over the centuries, and even today, as we limp towards the 21st century, society shamelessly condones violence in the home. It is only in the last two decades that there has been an attempt, however fragile, on the part of our legislators towards accepting the concept of the family as a partnership of mutual trust and affection between equals, rather than an enterprise subject to patriarchal control which is indissoluble.

Matrimonial Relief

In our country, a victim of domestic abuse has, theoretically, three different types of remedies at law: matrimonial relief, a suit for a civil wrong, and recourse to the Criminal Law. The earliest law in India making cruelty a ground for divorce was, surprisingly, the Dissolution of Muslim Marriages Act, 1939 which permitted a Muslim wife to obtain a decree of divorce if her husband had treated her with cruelty. In this Act, cruelty was given a wide meaning to include types of behaviour other than physical violence.

The Special Marriages Act enacted in 1954 came as a reprieve for a small section of women, as it made cruelty a ground for divorce. A Hindu woman, whose marriage had been solemnised under the Hindu Marriage Act, 1955 had to wait till as late as 1976 to obtain a divorce on grounds of cruelty by her husband, thanks to an amendment passed in that year. Prior to an amendment of 1988, a Parsi woman could only obtain a divorce on the ground of cruelty under the Parsi Marriage and Divorce Act, 1936, if her husband had caused her "grievous hurt", which was defined as: emasculation, permanent privation of a limb, or an eye, or of hearing in either ear, or permanent disfiguration of the head or face and any hurt endangering her life. Even today, a Christian woman whose marriage has

been solemnised in the church cannot obtain a divorce under the Indian Divorce Act, 1869, unless and until she can prove adultery too. Mere cruelty can entitle her, at best, for a judicial separation. The much belated recognition of the dissolubility of the union of marriage on the ground of cruelty, mental or physical, smacks of society's age-old condonation of violence within the home.

Civil Protection Orders Unspelt

But what if a battered woman desires relief from domestic abuse outside a matrimonial proceeding for dissolution of her marriage? Are there any means whereby she can keep her marriage and yet be protected from being abused by her husband? Of course, the problem of how to protect an abused woman is not addressed by Indian law, but even then, it is theoretically possible for a battered woman to obtain certain injunctions under the Civil Procedure Code, the Specific Relief Act and the common law. These injunctions can also be obtained under S. 7 (1)(d) of the Family Courts Act, which covers all matters "arising out of a marital relationship". Hence, for example, an abused woman can obtain a non-molestation order from the Civil Court, or the Family Court as the case may be, restraining her husband from abusing her physically and mentally. The word "molest" must be construed to mean not only violence, but harassment as well.

Shelters...and the Lack of Them

In several cases, the battering is so severe that the woman is forced to leave the matrimonial home just to stay alive. If her own family is not supportive or they stay far away, there is usually no place she can go to. In the major cities, there exist a few shelters. "In an emergency, there are, in effect no shelters for battered women in Bombay", says Pouruchisti Sethna of the Special Cell for Women, Bombay. "And the shelters that exist require clear proof of desertion or battering before they admit a woman. Rigid procedures for admittance are laid down: the woman has to give an application which will be considered by the managing committee of the shelter in their weekly meeting and then, if found acceptable, the woman will be taken in. Some shelters allow their inmates to go out for work, most do not, they are like closed shops."

The serious lack of shelters leaves no option to women but to stick on in a violent situation at home. "Because of this, we spend most of our time and energies in counselling women how to find some protection and survive within a violent situation without leaving the matrimonial home", states Lata P.M. of Women's Centre, Bombay.

In England, special provisions have been enacted in the Housing

Reported Cases of Domestic Violence in the City of Greater Mumbai			
Year	Murders U/s 302 IPC	Suicides U/s 306 IPC r/w 304B IPC	Harrassment U/s 498A and u/s 3,4,5 of Dowry Prevention Act
1986	4	38	41
1987	12	45	143
1988	2	56	152
1989	13	103	177
1990	9	72	143
Source: Social Service Branch, Crime Branch, C.I.D., Mumbai			

(Homeless Persons) Act, 1977 to provide shelter to women who have had to leave home as a result of domestic violence. This Act treats such women as homeless even if they "have accommodation, but it is possible that occupation of it will lead to violence...or to threats of violence from some other person residing in it and likely to carry out these threats". Even though the local council is bound by this law to provide some short term shelter for such women, nowadays, due to housing and public expenditure cuts in Britain, they instead press the women to go to court and get injunctions to get back into their matrimonial homes and get their men out.

Where a husband has been violent, it becomes crucial to exclude him from the matrimonial home or from a part of it, either as a "cooling off" period, or to give the wife some breathing space to plan how to deal with the violence at home, i.e. whether to move out, file for divorce and/or separation, find alternative accommodation, etc. "These kinds of injunctions, known as 'ouster injunctions', are difficult to obtain except in those cases where the matrimonial home is owned by the wife alone", says Ms Nilima Dutta, an advocate who has tried to make the law work in situations of domestic violence. "The courts are loath to exclude a man from a home he owns or where the tenancy is in his name."

Even in cases where the ownership or tenancy of the home is in the joint names of husband and wife, the courts do not give exclusion orders, even though such orders create no right in the property for the wife. Such a situation prevails because the courts and the law look at such matters as pure property issues and hence they refuse to dispossess a man of his property. In such matrimonial matters, the right to property should be split from the right of the wife to shelter in the matrimonial home and her right to be maintained by her husband. There is no other cogent solution to this issue. But of course, this would mean enacting a wholly different, specific law in this regard.

In England, ouster injunctions can be obtained by a wife or even a cohabitant, no matter in whose name the ownership or the tenancy of the matrimonial home stands, under the Matrimonial Homes Act, 1983 or the Domestic Violence and Matrimonial Proceedings Act, 1976. In the United States of America too, such orders are obtainable under the law of almost all the states.

Collateral Relief Essential

Where civil injunctions in a domestic violence situation are concerned, Ms Flavia Agnes, a lawyer-activist of the women's movement, makes a pertinent point: "I do not see violence as an exclusive power that men exercise over women — it is part of a general power that men have over women: economically, socially and physically. Say, if a woman obtains a non-molestation order, her husband may temporarily cease to molest her, but he may stop providing for her and the children. Then say, if a husband is ousted from the matrimonial home, he may very well cease to pay the rent, the outgoings or the housing loan installments, as the case may be.

"Then what will the wife do? The rights that accrue from a marriage — the right of the wife to reside in the matrimonial home, the right of the wife and the children to be maintained by the husband, the wife's right not to be abused or assaulted by the husband — are not specifically laid down by the law. These rights must be clearly defined and made effectively enforceable, if the institution of marriage has to be preserved. The courts, when granting reliefs like ouster, non-molestation, etc., must also grant collateral reliefs like maintenance, custody, etc. If a woman has to get out of a violent marriage, she must first be able to enforce her rights as a consequence of the marriage and then leave. Because, unlike as in the west where there are shelters and welfare schemes for divorced, deserted and abused women, here in India, no viable alternatives exist for women outside a marriage."

Powerless Orders

Enforcement is the Achilles heel of civil injunction orders because such orders, without effective enforcement, at best offer scant protection and at worst increase the victim's danger by creating a false sense of security. The main pitfall of civil injunction orders is the ineffective means of enforcing them. A violation of a civil injunction can only be countered by filing a contempt of court case against the violator. This means the victim will have to go through the motions of one more court case, and at the end of it all, even if the violator is held guilty of contempt, he may very well get off with a fine or, at most, with a few days of imprisonment in the civil prison, where the victim will have to pay for his upkeep!

In the case of Vandana M, she had obtained an injunction from the Family Court preventing her violent husband from entering her room where she was staying separately with her child. Just to spite this order, the husband not only forced himself in, but beat her black and blue and even forced her into having sexual intercourse. When she went, cut and bleeding to the police station for help, they advised her to follow up her case in the Family Court. The Family Court judge told her that he could do no more than issue the injunctions she sought, she could not expect him to stand guard at her door. In the circumstances, it becomes necessary that violation of civil orders must be made a criminal offence, if they are to be of more worth than the paper they are issued on.

In England, in order to make certain crucial injunctions truly effective, a "power of arrest" is attached to them by the courts. This enables the police to arrest, without a warrant, anyone whom they have reason to suspect has violated such an injunction. But a power of arrest can be attached to an injunction only if: (i) there has been actual bodily harm; and (b) there is a likelihood of future violence. Further, a power of arrest can be attached to an injunction for 3 months only, and a person so arrested must be brought before a court within 24 hours of his arrest, but must be released thereafter and cannot be remanded further.

A Costly Affair

For a woman without an independent income, going to court for relief is almost out of bounds due to the costs involved: court fees, lawyer's fees, typing costs, the inevitable tips to the court staff. Even in the Family Court, the litigant has to pay court fees for every injunction she seeks. The costs of litigation are exorbitant. As in the Labour Courts, court fees in the Family Court must be abolished. "If the Family Court is truly committed to preserving the institution of marriage, then why should it seek to raise revenue through matrimonial cases", quips Flavia Agnes.

Further, the complicated procedures involved in the filing and the hearing of a court case can confuse a woman and even make her more convinced of her powerlessness and the helplessness of her situation. Procedures, especially in the Family Courts, must be simplified, so that even a simple, illiterate woman can approach the court for relief in matrimonial matters. Forms of petitions can be provided free of cost to the litigants, not only in English, but in the major regional languages too. Then all the litigant needs do, is fill the details in the form. Also, court staff should be appointed with the specific purpose of helping litigants fill these forms and file their matters.

In the USA, laws in many states ensure that victims of domestic abuse

are provided with simplified forms and clerical assistance to help in the writing and filing of a petition. In some cities, a special cell in the court not only provides women with a packet containing petitioning information, forms and a list of resources, but also access to a video tape on the petitioning process, usually made by the local bar association. In the USA, there is also the phenomenon of "victim advocates" who are lay persons who have volunteered to assist victims throughout the case, from the filing to the hearing of the whole case.

Representation by Lawyers Necessary

The provision in the Family Courts Act which excludes lawyers from conducting cases there except with permission of the court may have reduced the delays in the disposal of the cases, but it has created other problems. "The male litigants are, in most cases, more educated and more articulate than the women", states Ms Sushma Thakur, an advocate practising on the matrimonial side in Bombay, "and this works to the disadvantage of the women if lawyers are not permitted to represent them." Moreover, one cannot expect a battered woman whose confidence has been undermined by months and years of physical and emotional battering, to stand up in court and, argue against her violent husband. It is absolutely essential, therefore, that the woman should be represented by a lawyer as of right in proceedings where domestic violence issues are involved, even if the husband has to pay for it.

"You may have the best of laws against domestic violence, but they will be of no use unless the relief sought is given immediately", asserts Flavia Agnes. The delays in courts are proverbial. Hence, it is imperative to lay down some statutory time limit within which cases dealing with domestic abuse must be heard and disposed of. Besides, *ex parte* relief in domestic violence cases must become the rule rather than the exception.

Legal Anomalies

There is one more procedural hurdle women have to face when seeking matrimonial relief in Civil Law — where to file the case. Divorce and other related proceedings can be filed where the Respondent resides or where the parties last resided together. If a woman from Calcutta is married to a man from Bombay and last resided with him there, she will be left with no option except to file her matter in Bombay, even though after having left home, she has no relatives there. For most women in such situations, the inconvenience of filing cases almost compels them to refrain from doing so. The forum for filing such cases must be determined by what is convenient to the Petitioner woman.

There is one anomaly in Indian law which needs to be remedied speedily. The rights that accrue to a woman from marriage are only available to her if she can prove, or if the man accepts, that she is officially and legally married to him. A woman who lives and cohabits with a man in the like manner in which a wife would with a husband, but who, for whatever reasons, is not officially or legally married to him, cannot claim maintenance, or a right to reside in their shared home, or any of the other rights normally enforceable by a wife against her husband. In the West, where cohabitation outside marriage is widespread, laws protect cohabitants to the like extent as a wife. A cohabitant has been defined by English Law to mean "a man or woman who are living with each other in the same household and who are living as husband and wife". Our country's laws need to catch up in this regard.

An Invisible Crime

In the opinion of all the lawyers, judges and litigants interviewed, the most effective and expeditious relief in domestic violence situations is a resort to the Criminal Law. Of course, violence between family members is not viewed as seriously as violence between strangers. If a man beats up a woman on the street, the police, the people around and the courts would be prompt to intervene; but if a man beats up his wife, no one, neither the neighbours nor the police will intervene unless compelled to. It is high time that domestic assaults, notwithstanding the fact that they take place between intimates, are treated as a crime no different from any other.

All forms of physical violence and some forms of emotional abuse, such as threats of physical violence and demands for dowry, fall within the definition of criminal conduct and are covered under the various sections of the Indian Penal Code: 323 (hurt) 324 (hurt by dangerous weapons or means), 325 (grievous hurt), 326 (grievous hurt by dangerous weapons or means), 352 (assault), 337 (assault in order to confine a person), 342 (wrongful confinement), 346 (wrongful confinement in secret), 506 (criminal intimidation). However no man can be prosecuted for raping or sexually assaulting a woman he is married to and from whom he is not legally separated. All the sections noted above, barring S. 326, are bailable offences, where the offender is entitled to be released immediately on furnishing bail. Further, S. 323, which a victim wife would most commonly invoke against her husband, is a non-cognisable offence, where the offender cannot be arrested without a warrant, and thus the wife would not be able to secure immediate relief.

Section 498A

This situation was technically remedied with the enactment in 1984 of S. 498A of the Indian Penal Code, which squarely makes domestic violence on women a non-bailable and a cognisable offence. This section can be invoked not only against the husband but also against any of his relatives as well. This section, contrary to popular misconception, does not only cover harassment for dowry, but also any wilful conduct which would drive the woman to commit suicide or cause grave injury, physical and mental. The enactment of this section, which came as a response to intense lobbying by women's organisations, can be seen as the first attempt by the legislature to treat violence in the family as a serious crime. It has been used extensively, though its weakness lies in the limited category of persons who can file an FIR under this section: the victim, or a person related to her by blood or marriage. Thus neighbours, police or passers by who might be more at hand when such domestic assaults are taking place rather than the wife's relatives, cannot make the initial complaint. Further, as this section is non-bailable, wily husbands have found out a way to avoid arrest. "The moment a violent husband gets wind of the fact that his wife has gone to the police station, he rushes to court for anticipatory bail, which is granted for the asking in such matters", complains Advocate Sushma Thakur.

In practice, the Criminal Law has proved to be of little assistance to the woman. This is largely due to the reluctance of the police to intervene positively in a family dispute. "Firstly, the sympathy of the police is with the man", asserts Lata P.M. of Women's Centre, Bombay. "Whenever a woman tries to lodge a complaint with the police, they will register only an NC (non-cognisable complaint). The police always resist registering a case under S. 498A. In the first place, they never inform a woman about her rights or the efficacy of registering a case under 498A and if, by chance, she knows about this section and insists that a case be registered under it, they will harass her with questions as to who has given her this information. The police almost resent the legal awareness of women. They adopt a very patronising attitude or terrorise them, just to avoid registering a complaint under S. 498A. The police often talk the women out of complaining, by stating that if they do complain, their husbands will lose their jobs! But I have never heard of anyone being suspended or dismissed because a 498A case was registered against him."

The police normally do not register a case under S. 498A unless and until there has been severe violence. The normal practice is to register an NC and call the husband to the police station to mete out a few threats and warnings. But where there have been arrests, the common experience of women's rights activists and advocates interviewed was that the violence

had subsided in most cases. Thus, arrest acts as a deterrent to the violent man. But to get the police to arrest him is a big hurdle. There is a need to ensure by legislation, that the police are given special training in the handling of cases of domestic violence: they must be made fully aware of the law; they must treat incidents of domestic violence as seriously as they would treat any other crime; they must mandatorily apprise the victim of her rights under the law; they must respond to every complaint of domestic violence, however made (by telephone etc.) and by whomsoever made (i.e. neighbours, family members of the victim, etc.); they must act expeditiously in such cases. Of course all this will remain a dead letter unless it is made binding on the police by new legislation.

Diversion or Subversion?

In the USA, some laws make provision for diversion or mediation schemes, which defer or suspend prosecution if the violent man agrees to enter into a mediation/conciliation process with his wife so that they can reach a voluntary and mutually satisfactory agreement. Such schemes necessarily require the man to enter into a programme of counselling to teach him non-abusive ways of relating to his partner. Diversion occurs before any adjudication of guilt and, in the schemes that exist, divert the man from the criminal process at one of two stages: at the time of arrest, on the initiative of the police, or just before the trial, at the behest of the prosecutor.

These schemes are based on the premise that families should be protected from the intrusiveness of the judicial system and that problems within families are best solved through informal remedies that help parties communicate more effectively. These schemes, though seemingly attractive, have proved to be problematic as they cater more to the needs of the abuser rather than the victim. The dynamics of such a scheme means that the abuser is not punished for his crime and that his victim shares responsibility for his actions. She is, more often than not, required to modify her behaviour in exchange for his promise not to abuse her further. Experience in the USA has shown that the schemes of diversion are usually used by abusive husbands to subvert the law and escape arrest and prosecution.

New Law Needed

From the above, it is apparent that the issue of tackling domestic violence is still not addressed by Indian law, and in those cases where the law has indeed been used to protect the victim or punish the abuser, the process has been subjective, based mostly on the legal prowess of the lawyer or the sensitivity of the judge.

It is, therefore, necessary to enact a law specifically dealing with cases of domestic violence, so that no one is left in doubt about society's condemnation of abusive behaviour in the home, the punishment to the abuser, and the modes of protection for the victim.

But of course legal remedies alone are insufficient. This is because domestic violence is not a legal, but basically a social problem. So long as neighbours and friends ignore or excuse the violence and refuse to intervene, no matter how perfect the law against domestic violence may be, there will be no relief for battered women.

The violence is meted out by one man but the responsibility for it goes far beyond him — to society. This issue must be addressed publicly and in the most vehement terms. Governments must also allocate sufficient funds for setting up shelters and other resources to provide for the needs of abused women, organise education and training programmes for police and law officers, and initiate public educational measures to raise the general level of awareness about domestic violence.

Ultimately, however, violence against women in the family and elsewhere is the product of the inferior status of women in our society and hence, it can only be eradicated if concrete steps are taken to guarantee women equality in all spheres of life.

Women must be assured legal and financial independence and they must be assured that there is no assumption of male domination within intimate relationships. This will only come about along with a radical, fundamental transformation of the social and economic structures that maintain the subordination of women within marriage and within society. Till then, the fact of violence against women, whether in the home or outside, will remain the biggest human rights issue on the agenda of society.

(From, *The Lawyers*, April 1991).

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Vahida Nainar

Family Laws of Pakistan, Bangladesh and China

THE FAMILY LAWS of Pakistan and Bangladesh and the Muslim minority of India are very similar due to their common origin in Moghul rule and later influence of British imperialism. The family codes of Pakistan and Bangladesh were influenced by three major acts passed during British rule. These acts were:

1. The Child Marriage Restraint Act, 1929 — This fixed the minimum age for marriage of girls as not earlier than at puberty and provides a penalty in case of violation thereof.

2. Dissolution of Muslim Marriages Act, 1939 — Under this Act, a married minor girl after coming of age may exercise her "option of puberty" and repudiate her marriage if she so wishes, before she is eighteen years of age, provided that the marriage has not been consummated. The right to dissolve a minor's marriage is conferred on her guardian. This act gives the wife the right to get a decree from the court, dissolving her marriage in case her husband neglects to maintain her, treats her cruelly, or commits any such other acts mentioned in S. 2 of the Act.

3. The Shariat Act, 1939 — This Act made the Shariat Laws applicable to Muslims all over the country, and customs and usages contrary to it were declared null and void (except in matters relating to agricultural land).

Post 1947

In 1961, the Muslim Family Law Ordinance was passed, which applies to all citizens of Pakistan and includes matters relating to succession,

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registration of marriage, polygamy and talaq. The main features of this Ordinance are as follows:

1. Registration of marriage was made compulsory and a standard form of nikaahnama introduced.

2. It provides that no man, shall practise polygamy during the subsistence of an existing marriage without prior written permission from the Arbitration Council; violation of this provision entails liability of conviction and sentence.

3. Unilateral pronouncement of talaq by husbands was curtailed procedurally. The husband must apply to the Arbitration Council for such talaq and the Council after due consideration may or may not grant talaq.

4. Amendment to the Child Marriage Restraint Act, 1929, by raising the permissible age of marriage for females from 14 to 16 and reducing it from 21 to 18 for males.

5. Amendment to the Dissolution of Muslim Marriages Act, 1939, by adding a clause that in case the husband remarries in contravention of the provisions of the Muslim Family Law Ordinance, the wife may exercise her right to decree for divorce.

6. It further provides that if any husband fails to maintain his wife or wives equitably, the wife or wives may, in addition to seeking any other legal remedy available, apply to the Arbitration Council to determine the matter.

Other important laws enacted in Pakistan are:

1. The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 — This Act provides for the application of Shariat Law in disputes relating to succession, special property of females, betrothal, marriage, divorce, dowry, adoption, guardianship and other matters as specified in S. 2 of the Act, notwithstanding any custom or usage, to all parties who are Muslims. Such application is subject to and superseded by any statute in force. Besides, under this Act, Muslim Law is applicable in accordance with the sect to which an individual belongs.

2. The West Pakistan Family Courts Act, 1964 — This act was expected to cut down on procedures for expeditious settlement and disposal of family disputes.

3. The West Pakistan Family Courts Rules, 1965 — Under this law certain rules were laid down, which provide for the procedure to be followed by Family Courts while deciding disputes relating to family affairs.

4. Dowry and Bridal Gifts (Restriction) Act, 1976 — This Act was passed to provide for restrictions on dowry and bridal gifts, and for matters connected therewith, like restrictions on expenditure on marriage, compulsory display of dowry, vesting of dowry in the bride list of dowry to be compulsorily furnished before the Registrar. Violation of rules mentioned in this Act invites penalty and confinement.

The Martial Law Regime from 1977 to 1984 saw the Islamisation of Personal Laws in Pakistan, which stalled all attempts at progress. The Hudood Ordinance was passed in 1979. The next Ordinance to be passed was the Zina Ordinance which is the most derogatory one, whereby a woman can easily be victimised by unscrupulous people who could go scot free for want of proper evidence against them. The more recent Qanoon-e-Shahaadat, passed in 1984, has placed restrictions on the right of women to attest documents.

In 1971, East Pakistan inherited its legal system from India and Pakistan. The major statutes in Family Law, like Muslim Family Law Ordinance, 1961 and East Pakistan Waqf Ordinance, 1962 are still in force. These laws govern major aspects of family life and matters arising out of it.

In addition, the Muslim Marriages and Divorce (Registration) Act, 1974, formulated simple procedures so as to make registration of marriages and divorce easier. The Dowry Prohibition Act and the Cruelty to Women (Deterrent Punishment) Ordinance were passed in 1980 and 1983 respectively. Both these laws recognise the acts as offences and the commission of these acts was made punishable by law although the offences were bailable. In 1985, Family Courts were established by passing an Ordinance to that effect to ensure expeditious disposal of cases related to family life. Thus Family Laws operational in Bangladesh are not very different from those in Pakistan.

China

The early twentieth century saw the rise of Dr Sun Yat Sen. In 1911 he, overthrew the Manchu regime and founded the Republic of China. The Family Law of the Republic of China was promulgated in 1930, during which period China experienced conflict between old and new trends of thought. China adopted many judicial concepts from foreign countries, especially Germany, France, Switzerland, and Japan to amend some traditional Chinese thoughts to a certain degree. As a result, most regulations in Family Law are discordant with what is known as traditional Chinese concepts and adopt, the principle of equal rights for both sexes. However, due to sharp discrepancy between the current social situation and

that entailed in this Family Law, it was revised in 1985. The Family Law revised in 1985 rectified many unfair rules to promote equality for both sexes. How far it has succeeded in its objectives may be judged from the various family issues discussed below as specified in the Revised Family Law:

Marriage: According to the Revised Family Law of China for a valid marriage the following conditions need to be fulfilled:

i) 18 years of age for a man and 16 years for a girl;

ii) non-existence of bigamy;

iii) non-existence of a marriage between persons committing adultery;

iv) an open ceremony in the presence of two or more witnesses;

Anyone under 20 years of age should obtain the consent of his/her statutory guardian before marrying.

Divorce: There are two forms of divorce under the Revised Family Law, 1985, They are:

1) Divorce by Agreement — This is a concept similar to that of divorce by mutual consent. It must be rendered in written form and bear the signatures of two or more witnesses in order to be enforceable by law. Such an agreement shall then be registered.

2) Judicial Divorce — Under judicial divorce, either of the spouses may appeal to the court for dissolution of marriage, establishing the existence of any of the following situations:

i) bigamy

ii) adultery

iii) cruelty that renders cohabitation impossible

iv) cruelty to or by the adverse party's lineal ascendant

v) willful desertion

vi) attempt to murder

vii) incurable loathsome disease

viii) serious and incurable mental disease

ix) existence unknown for over three years

x) sentence of imprisonment for over three years or conviction for infamous crime.

Besides the above, if any significant event renders the maintenance of marriage impossible, the innocent party may appeal to the court for divorce.

Alimony: The Chinese Law has provided that in case of divorce by agreement, it is up to the husband to decide whether or not he should give alimony to his wife. In case of judicial divorce, either of the spouses who is not at fault, can on divorce claim alimony from the other party, if he/she has no work ability or property to support himself/herself.

Matrimonial Property: The matrimonial property system in the Republic of China is divided into two types:

1) The Contractual Property Scheme: This scheme covers two other forms of matrimonial property schemes. They are:

i) Integrated Property Scheme — According to this scheme, except for special property, all property and income of the spouses combine to form the integrated property which is managed by the husband, while the management expenses are supported by their integrated property. The living expenses of the household are also supposed to be paid by their integrated property.

ii) Separate Property Scheme — Under this scheme, either of the spouses retains the right of ownership, management and collection of the proceeds of their separate property.

2) The Statutory Scheme: Unless otherwise provided by both parties before or after marriage, this scheme applies to all couples. Under this scheme, barring special property, all property belonging to the spouses at the time of marriage and property acquired by them after their marriage becomes their union property.

Succession: The law provides that both man and woman whether married or unmarried, are entitled to succeed to their parent's legacy, and their shares are the same. Besides, a wife is also entitled to her husband's legacy and enjoys the same share with her children.

(From, *The Lawyers*, June 1988).

Declaration of the Workshop on Family Laws and Human Rights of Women, Lahore.

We present below the entire text of the declaration adopted at the workshop on Family Laws in Lahore, on August 4 and 5, 1995.

Preamble

• Recalling that the constitutions of Bangladesh, India and Pakistan guarantee all citizens equality before the law;

• Noting that such equality is denied to women and children in the sphere of Family Laws and which is of crucial significance to them; and,

• Realising that Family Laws of religious minorities have remained even more stagnant and often bear the risk of being influenced by the norms of the religious majority;

• The participants of the two-day Workshop on Family Laws and Human Rights of Women in Bangladesh, India and Pakistan organised by AGHS Legal Aid Cell Lahore, call upon concerned persons, social action groups, political parties, legislators and the governments of these countries to campaign for and initiate reforms in the Family Laws in order to make them just and guarantee equal rights to all women and children.

The minimum requirements for such standards are:

1. Marriage, Separation and Divorce

• Both women and men shall be entitled to a free choice in marriage.

• All women and men shall have equal rights in all matters relating to marriage, divorce, guardianship, maintenance and custody of children.

• Marriages and divorces shall be properly registered and easy access to records be provided.

• Child marriage shall be abolished. The minimum age of marriage for both women and men shall be eighteen years.

• All polygamous marriages shall be banned and made punishable. Such marriages shall be null and void and the injured party be adequately compensated.

• Provisions pertaining to restitution of conjugal rights shall be deleted.

• A Civil Law shall be enacted to provide for inter-faith marriages and their registration.

• Women and men shall have equal rights under citizenship laws and domiciliary regulations.

• Spouses shall be entitled to judicial separation by mutual consent.

• Distribution of movable and immovable assets and income upon divorce or dissolution of marriage shall be based on principles of justice and equity.

• Matrimonial courts shall be established to deal exclusively with all disputes under Family Laws (including inheritance and return of personal belongings to the spouses). These courts shall have jurisdiction in respect of family matters of all religious communities. Court fees should be minimal.

• The matrimonial courts shall have adequate representation of judges from religious minorities and women.

• Execution of decrees passed by the matrimonial courts shall be made more effective and efficient.

• Laws shall be enacted to allow for transfer of cases from one jurisdiction to another in family matters.

• Women and men shall have statutory rights of free access to information about their rights through all avenues, including legal aid, the media and through curriculum in formal and informal educational centres.

2. Guardianship, Custody, Adoption and Other Rights of the Child

• All children born in wedlock or out of it shall enjoy equal status and equal rights.

• The law must recognise both parents as the natural guardians of the child.

• In case of separation amongst spouses custody of minors should be awarded upon sole consideration of the welfare of the minor.

• In passing orders relating to custody the court shall also pass appropriate orders for the minor's maintenance and management of his/her property.

• Every adult person shall have the right to adopt children.

• All questions of custody and maintenance of the property and adoption of the minor shall be decided by the Matrimonial Courts.

• All matters of adoption shall be dealt with by Matrimonial Courts.

3. Economic Rights of Women Within Marriage

• The economic rights of women on marriage, during the subsistence of marriage and on dissolution of marriage shall be protected by law.

• All endowments pledged to a woman at the time of her marriage, whether by parents, parents-in-law or her husband, and gifts given to her shall be her absolute and separate property.

• Adequate maintenance including interim maintenance shall be provided to the dependent spouse during the subsistence of the marriage.

• During the subsistence of the marriage the wife's access to matrimonial assets must be guaranteed including her right to reside in the matrimonial home.

• Laws against domestic violence shall empower the courts to grant injunction restraining a violent spouse from entering the matrimonial home.

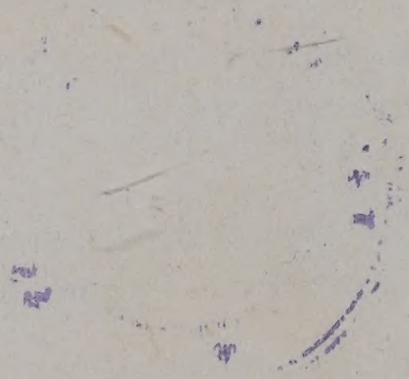
• In case of dissolution of a marriage the courts shall decide all related matters e.g. divorce/dissolution, maintenance/alimony or dower/financial settlement and provision of shelter simultaneously except disputes relating to custody of minors. In doing so, separate procedures be laid down in order to provide for expeditious disposal of suits.

• Assets movable or immovable accumulated during the subsistence of the marriage shall be distributed equally on the termination of the marriage.

• Inheritance laws shall be changed to ensure that the share of the male and female heirs of same class of kinship shall be equal. Upon the death of the husband, the widow and her children shall inherit in equal proportion, half of the immovable and movable assets accumulated by the couple during the subsistence of the marriage. The widow shall remain the sole owner of the balance half of such assets till her death.

• The children shall inherit in equal proportion, the share of their mother's assets.

(From, *The Lawyers*, August 1995)



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About *Justice For Women*

For over a decade now, *The Lawyers*, a popular legal journal brought out by the public interest group, the Lawyers Collective, has provided the only focussed critique from the standpoint of gender justice of the different Personal Laws existing in India.

The articles in the present volume report the debates, discussions and radical thinking that emerged over time in the pages of the journal from 1986, which was not only the year in which *The Lawyers* itself was inaugurated, but also the year in which the Muslim Women's (Protection of Rights on Divorce) Act was passed by Parliament — a major turning point in Indian politics.

What the numerous contributions — more than fifty in all — document beyond doubt is that the Personal Law regime — whether Hindu, Muslim, Christian or Parsi — actively discriminates against women. Hindu Law, for example, despite its bold claim of being reformed, actually treats women as second class citizens. Indian Muslim Law has several anti-women features that are not allowed even by wholly Muslim regimes elsewhere including Pakistan.

As Indira Jaising observes in her lucid introduction to this extraordinary collection of essays, the regime of Personal Laws is nothing but an offence against a Constitution committed to gender just laws.

Justice for Women naturally covers every major issue involving just laws for women in India: marriage and divorce, maintenance, custody and guardianship, matrimonial property and family courts. The final section comprises several recommendations for law reform in the direction of just laws for women.

Altogether, *Justice for Women* is a classic collection of essays written with great legal competence and a wide ranging perspective, useful for both lawyer and lay person alike. It is bound to be relied upon as a standard reference on gender law issues for several years to come.

Indira Jaising is a senior advocate of the Supreme Court of India and the editor of *The Lawyers* since the journal's inception. She has been closely associated with several landmark cases that have successfully challenged specific laws unjust to women in different parts of the country.

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